INDEX

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5847

HARRELL ALEXANDER, SR., PETITIONER,

v.

GARDNER-DENVER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUMMARY OF RELEVANT DOCKET ENTRIES

Date	Court	Item Filed
August 25, 1970	U.S. District Court For The District of Colorado (hereafter District Court)	Complaint
November 17, 1970	District Court	Answer
January 29, 1971	District Court	Deposition of Harrell Alexander
February 12, 1971	District Court	Motion for Summary Judgment Filed
February 12, 1971	District Court	Request for Admission
March 25, 1971	District Court	Response to Defendant's Request for Admissions

July 7, 1971	District Court	Memorandum Opinion and Order
July 16, 1971	District Court	Judgment Entered
August 5, 1971	District Court	Notice of Appeal
November 17, 1971	U. S. Court of Appeals Tenth Circuit	Stipulation
August 11, 1972	U. S. Court of Appeals Tenth Circuit	Opinion and Order Affirming District Court
August 11, 1972	U. S. Court of Appeals Tenth Circuit	Judgment
November 2, 1972	U. S. Supreme Court	Motion for Extension of Time to File Petition for Certiorari
November 8, 1972	U. S. Supreme Court	Order of Justice White Granting Extension Until December 8, 1972
December 8, 1972	U. S. Supreme Court	Motion to Proceed in Forma Pauperis and Petition for Certiorari Filed
January 5, 1973	U. S. Supreme Court	Brief in Opposition to Petition for Certiorari Filed
February 20, 1973	U. S. Supreme Court	Motion to Proceed in Forma Pauperis and Petition for Certiorari Granted

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. C-2476

HARRELL ALEXANDER, SR., PLAINTIFF,

vs.

GARDNER-DENVER COMPANY, A Delaware corporation, DEFENDANT.

Complaint

COME Now the plaintiff by and through his attorney, Philip M. Jones, and for the Complaint against the defendant states and alleges as follows:

1. That jurisdiction of this Court is invoked pursuant to 28 USC § 1343 and 42 USC § 2000 et. seq. and more specifically 42 USC § 2000 e-5.

2. That the acts hereinafter complained of occurred in the State and District of Colorado.

3. That the plaintiff is a citizen and resident of the City of Denver and State of Colorado.

4. That the plaintiff has performed all conditions precedent to the bringing of this action.

5. That at all times pertinent herein, the defendant is and was engaged in interstate commerce, and is and was doing business in the State of Colorado.

6. That the defendant is and was at all times pertinent herein an employer under the meaning of 42 USC, § 2000e.

7. That the plaintiff is a person as defined by 42 USC § 2000e and as such is entitled to institute this action.

8. That the plaintiff was employed by the defendant in May, 1966, and assigned to the Yard Department.

9. That on June 11, 1968, plaintiff bid on and was awarded a position as a drill operator trainee.

10. That the plaintiff was discharged by the defendant on September 29, 1969.

11. That the plaintiff was satisfactorily performing his tasks at the time of his discharge and in fact was discharged because he was of the Negro Race, in violation of 42 United States Code, § 2000e et. seq. and more specifically § 2000e-2(a)(1) to wit:

"(a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . ."

12. That the plaintiff filed a charge, in writing and under oath with the Equal Employment Opportunity Commission (EEOC).

13. That pursuant to 29 CFR § 1601.25(a) a Notice of Right to Sue was issued by the EEOC.

14. That as a result of the unlawful employment practices of the defendant as heretofore set forth, the plaintiff has incurred damages as follows:

a. Loss of earnings since on or about September 29, 1969, in the estimated amount of $5,720.00, the precise amount can be determined by the records and information in the possession of the defendant.

b. Loss of seniority benefits in an amount yet to be determined which can be determined by the records and information in the possession of the defendant.

c. Loss of retirement benefits in an amount yet to be determined which can be determined by the records and information in the possession of the defendant.

WHEREFORE, plaintiff prays for judgment against the defendant as follows:

1. A permanent injunction against the defendant enjoining said defendant from engaging in or repeating its unlawful employment practices toward plaintiff or any other member of the Negro race.

2. Damages in the approximate amount of $5,720.00 which sum would have been earned by the plaintiff if the defendant had not engaged in unlawful employment practices toward him, and for such additional damages as plaintiff may have sustained for loss of seniority benefits and retirement benefits; all such damages to be more specifically proved at trial from information and records now in the possession of the defendant.

3. Interest, costs, including reasonable attorney's fees and expert witness fees to be taxed as part of the costs of this action.

4. For such further relief as to the Court seems just and proper.

Respectfully Submitted,

By: Philip M. Jones
Parkview Professional Building
1839 York Street
Denver, Colorado 80206
Telephone: 399-6360

Address of Plaintiff:
3610 Fairfax Street
Denver, Colorado

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

ANSWER

COMES Now the defendant, Gardner-Denver Company, by its attorney, Robert G. Good, and for answer to the plaintiff's complaint, admits, denies and avers as follows:

FIRST DEFENSE

1. Defendant denies each and every allegation contained in paragraph I of plaintiff's Complaint.

2. Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegation contained in paragraph II of plaintiff's Complaint.

3. Defendant admits the allegations contained in paragraph III of plaintiff's Complaint.

4. Defendant denies each and every allegation contained in paragraph IV of plaintiff's Complaint.

5. Defendant admits the allegations contained in paragraph V of plaintiff's Complaint.

6. Defendant admits the allegations contained in paragraph VI of plaintiff's Complaint.

7. Defendant admits that part of allegation number VII of plaintiff's Complaint alleging that plaintiff is a person as defined by 42 U.S.C. Sec. 2000(e) and denies each and every other allegation contained in paragraph VII of the Complaint.

8. Defendant admits the allegations contained in paragraph VIII of plaintiff's Complaint.

9. Defendant admits the allegations contained in paragraph IX of plaintiff's Complaint.

10. Defendant admits the allegations contained in paragraph X of plaintiff's Complaint.

11. Defendant denies each and every allegation contained in paragraph XI of plaintiff's Complaint.

12. Defendant admits the allegations contained in paragraph XII of plaintiff's Complaint.

13. Defendant denies the allegations contained in paragraph XIII of plaintiff's Complaint.

14. Defendant denies each and every allegation contained in paragraph XIV of plaintiff's Complaint.

Second Defense

Plaintiff's Complaint fails to state a claim upon which any relief may be granted against the defendant.

Third Defense

That portion of paragraph I of plaintiff's prayer clause seeking a permanent injunction enjoining the defendant on behalf of "any other member of the Negro race" is inappropriate, since said Complaint does not allege a class action within the meaning of Rule 23 of the Federal Rules of Civil Procedure.

Affirmative Defenses

Comes Now the defendant and for Affirmative Defenses avers as follows:

First Affirmative Defense

1. That this Court is without jurisdiction over the subject matter of this action because the following conditions precedent were not complied with prior to the issuance of the Equal Employment Opportunity Commission's "Notice of Right to Sue Within 30 Days" and/or the plaintiff's commencement of the instant action:

a. The Equal Employment Opportunity Commission did not find "reasonable cause" as required by 42 U.S.C. Sec. 2000e-5.
b. The Equal Employment Opportunity Commission did not attempt to obtain voluntary compliance.
c. The plaintiff did not demand in writing that Notice of Right to Sue issue, as required by the Equal Employment Opportunity Commission's Procedural Regulations.
d. The plaintiff's Complaint was not timely filed within the meaning of 42 U.S.C. Sec. 2000e-5e.
e. That the failure of plaintiff to meet the requirements of (a) or (b) or (c) or (d) above deprives this Court of jurisdiction.

SECOND AFFIRMATIVE DEFENSE

1. The defendant incorporates by reference herein paragraphs 1 of the First Affirmative Defense.

2. That the plaintiff's failure to satisfy each and every procedural prerequisite deprives the plaintiff of standing to maintain the instant action.

THIRD AFFIRMATIVE DEFENSE

1. That the plaintiff was discharged for just cause on or about September 29, 1969.

2. That pursuant to a collective bargaining contract in effect between the defendant and the United Steelworkers of America, local Union No. 3029, the plaintiff filed a grievance on or about October 1, 1969, alleging that he was "unjustly discharged."

3. That pursuant to said collective bargaining agreement an arbitration hearing was held on November 20, 1969, before Mr. Don W. Sears, an impartial arbitrator.

4. That said arbitrator's award issued on December 30, 1969, dismissed plaintiff's grievance and ruled that plaintiff "was discharged for just cause."

5. That said arbitration award has the effect of a fiinal judgment within the meaning of the Federal Arbitration Act, 9 U.S.C. Sec. 9, 10 and 11.

6. That said arbitration award is binding upon the plaintiff and precludes the plaintiff from maintaining the instant action under Title VII of the Civil Rights Act of 1964.

7. That a refusal to give the arbitration award binding effect would be inequitable to the defendant and would seriously undermine the operation of the grievance and arbitration procedure.

FOURTH AFFIRMATIVE DEFENSE

1. That on or about November 5, 1969, the plaintiff filed a charge with the Equal Employment Opportunity Commission.

2. That said charge alleged that the defendant, Gardner-Denver Company, discharged plaintiff because of his race, in violation of 42 U.S.C. Sec. 2000e et seq.

3. That on or about July 1, 1970, the Equal Employment

Opportunity Commission issued a decision which stated that "reasonable cause does not exist to believe that Respondent engaged in unlawful practices in violation of Title VII of the Civil Rights Act of 1964."

4. That said Equal Employment Opportunity Commission decision precludes the plaintiff from maintaining the instant action.

FIFTH AFFIRMATIVE DEFENSE

1. The defendant incorporates by reference herein paragraphs 1, 2, 3, 4, 5, 6 and 7 of the Third Affirmative Defense and paragraphs 1, 2, 3 and 4 of the Fourth Affirmative Defense.

2. That as the result of the arbitrator's award and the Equal Employment Opportunity Commission's decision that plaintiff was discharged for just cause, the plaintiff is estopped from maintaining the instant action.

WHEREFORE, defendant prays that the Complaint be dismissed in its entirety and for costs, expert witness fees, and such other and further relief as the Court deems proper.

/s/ Robert G. Good
Attorney for Defendant
917 American National Bank Bldg.
Denver, Colorado 80202 222-7956

Address of Defendant:
1727 East 39th Avenue
Denver, Colorado 80205

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Caption Omitted in Printing]

DEPOSITION OF HARRELL ALEXANDER, SR. (Taken by Defendant)

* * *

HARRELL ALEXANDER, SR., the Plaintiff herein, being first duly sworn, was examined and testified on his oath as follows:

* * *

[64] Q. Now, when you were suspended subject to discharge, you did file a grievance on that, did you not?

A. Yes, we did.

Q. And I believe your first hearing started at Step 2, did it not.

A. First hearing started at Step 1, which is at the time we filed the grievance with the local union steward. Then the next step was setting up to meet with the supervisors.

Q. And then you did meet with the supervisors?

A. Yes.

Q. What step was that?

A. Step 2.

Q. What supervisors were at that meeting?

A. I believe to my knowledge Mr. Schumacher.

Q. The general superintendent for Gardner-Denver?

A. Right.

Q. Who else was present at that meeting?

A. The local grievance man and myself and McFarlin.

[65] Q. The grievance man was Earl Comb?

A. Yes.

Q. And McFarlin?

A. Right.

Q. And yourself?

A. Right.

Q. Now, am I correct at that Step No. 2 you did state that you thought you were being discriminated against and that the scrap wasn't excessive?

A. I don't think a statement of discrimination was made at that time.

Q. Which step was discrimination mentioned?

A. None of the union steps. I filed with the Commission.

Q. The arbitration?

A. No. I made mention there when I wrote the letter.

Q. At the arbitration?

A. Prior to that. It was to the United Steel man that I wrote the first letter to.

Q. United Steel Workers Union?

A. Yes.

Q. You wrote a letter to them?

A. Right.

Q. When was that?

A. That was around about October—I don't have the [66] date. It was October of '69. It was after these first two steps had taken place. Must have been in the neighborhood of the 6th or 8th. Somewhere in there.

Q. Did you retain a copy of that letter?

THE WITNESS: Do you have a copy of that?

MR. JONES: It was written in October of '69?

THE WITNESS: Yes. Letter where it was all—with the valuable discovery that I made, and being the target of discrimination.

MR. JONES: I have got a copy of it.

MR. GOOD: Maybe we already have it.

Off the record.

(A discussion was then had off the record.)

MR. GOOD: Back on the record.

Q. (By Mr. Good) Your letter of October 10th to the United States Steel Workers, Mr. Alexander, did you draft that letter or did someone else?

A. No, I did along with the assistance of my pastor at the time.

Q. What was his name?

A. Reverend A. L. Scott.

Q. Didn't Mr. Scott appear at Step 4 of the grievance as your attorney?

A. No, he did not. Not as my attorney. Lawyer and a minister are somewhat different, I believe.

[67] Q. Did he appear at some step in the grievance?

A. He was down with me, yes. We met at the United States Steel office.

Q. And discrimination on the basis of race was raised in that step, wasn't it?

A. Yes.

Q. And what position did the company take?

A. I don't know. It was presented to the United States Steel man. He was a local man of this grievance committee at the time. He was over all of them. So I don't know what step he followed up on.

Q. Now, at the arbitration, who represented you there?

A. The United States Steel Workers went along with Mr. Baunhover, the union president.

Q. Bert?

A. Bert was the union man. He was there. Along with the president of the union.

Q. Now, at the arbitration, who was it that raised the issue of race?

A. Mr. Bert.

Q. How did he raise that?

A. By the letter that I wrote to him, explaining my position and what I had discovered.

Q. And subsequently the arbitrator, who was Mr. Don Sears—do you remember that name?

[68] A. Yes.

Q. He ruled that you were justly discharged; correct?

A. He stated something of that nature, along with some other suggestions that he made. I am sure you have a copy of it.

Q. And he did not conclude that you were discharged because you were black; correct?

A. No, he went according to the testimony that he had heard from the union, and they had time to prearrange their testimony and their charges against me, which I was inadequate in representing myself, and I should have had the right of representation from the union, which I did not receive at that time, in order to cope with what they had.

Q. The union did on your behalf allege you were fired discriminatorily; correct?

A. They read the statement I had sent to them, and they knew it was somethng to that effect.

Q. Yes, they did read verbatim your letter of October 10th?

A. Yeah, along with Mr. Bert. They rearranged it. It weakened it down. The original letter I wrote—he said discrimination was a big charge and has to be proven and have to have witnesses and all this.

Q. Did you provide any witnesses at the arbitration or any evidence of—

[69] A. I was not informed to have any. This is why I said without adequate representation from the union I was let down.

Q. Did you testify at the arbitration?

A. Yes.

Q. And you did—wasn't it—what did you have in support of your testimony that you were fired because you were black?

A. Well, I didn't have any support other than the conversation and knowledge—a man was a journeyman machinist, and he was qualified on the function of the drill, and he got up and drew an illustration on the board, and they had a piece of junk in there as scrap, saying they couldn't possibly drill a hole at that angle from this position. So they outweighed me on their theories.

Q. You felt that although the union raised the race issue at the arbitration they were really trying to water it down?

A. Yeah, I know they were.

Q. And when you took the stand did you try and water down the race issue, also?

A. No, I didn't. I held it up and at that time I told them that I had already filed with the City Commission because I could not rely on the union. All Caucasians. Don't have a black representative in there.

Q. When you say 'filed with the City,'' you mean the [70] Colorado Civil Rights Commission?

A. Yes.

Q. You say the union was all Caucasian. Isn't it true at one time you asked your shop steward, union steward, Mr. Combs, if the union had a civil rights committee? Do you recall asking him that and he responded that they did, and then you asked him what was the color makeup of that committee and he responded that there were several Negroes on that committee?

A. There was a Negro.

Q. One Negro?

A. Yes, but they don't get in the grievances. They handle disputes in other areas. They are never called in on a grievance.

Q. Did you feel that—well, who else was at the arbitration? Mr. Dean Schroeder, the personnel manager, was there; correct?

A. Yes.

Q. Did you feel Mr. Schroeder was discriminating against you?

A. To a certain extent.

Q. To what extent?

A. That he wouldn't consider my return back to the other department.

Q. You think he did that because you were black?

[71] A. I cannot answer that. I don't know.

Q. Did you feel the arbitrator was—was the arbitrator white or black?

A. You know Mr. Sears personally. He's Caucasian.

Q. We have to establish things for the record, and that's why I have to ask you some obvious questions.

Did you feel Mr. Sears discriminated against you because of your color?

A. Because he's an arbitrator he's a man to listen to sides, but as an arbitrator for myself, I never would have chosen him because he pointed out that he did not know anything about drills, didn't know anything about the function of drilling holes. So how can a man say who's right and who's wrong if he's going to arbitrate on a certain incident? He made it clear in the session that he did not know anything about hand drills nor the function of hand drills.

Q. And so when the arbitrator's decision came down, you received a copy of it, did you?

A. Yes, I did.

Q. Did you disagree with his findings?

A. Yes.

Q. And, nevertheless, you felt he was wrong in not finding that you were fired because you're black?

A. Would you rephrase that now?

Q. That was a little sloppy.

[72] Even after you read the arbitrator's decision, or after you read the arbitrator's decision, you felt that the arbitrator was wrong in not finding that you were fired because you were black?

A. Not necessarily because I was black, but because it was unjust in his thinking because that night after we left the committee meeting—that night I was assured by Mr. Bert that he knew the arbitrator personally and from what he could gather that it would be favorable in my behalf. And after I received the response of his conclusion, then

I was somewhat let down because I had been assured this verbally, that everything was going in my favor and that no doubt they would consider getting my job back and returning to work.

Q. Do you feel that if it were a white man at that arbitration instead of yourself who had the same record you had, that that man would have been put back to work?

A. To my knowledge I don't believe he would have even reached that far. He would have been put back to work earlier because it had happened—people have taken off two or three weeks at a time without telling anybody and returned and got their job back.

Q. Can you give me any names?

A. No, I cannot. It's on the records. You can request to see their records. What I am actually saying is it would never have gone that far—I don't know any other

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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MOTION FOR SUMMARY JUDGMENT

COMES NOW the defendant, Gardner-Denver Company, by its attorney, Robert G. Good, pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure and respectfully moves this Court to grant summary judgment in favor of the defendant.

AND AS GROUNDS THEREFOR defendant asserts as follows:

1. That the plaintiff's Complaint was not timely filed as required by 42 U.S.C.A. Sec. 2000e-5e.

2. That the Equal Employment Opportunity Commission held that "reasonable cause does not exist to believe that Respondent engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964." Said decision of the Equal Employment Opportunity Commission is determinative of the plaintiff's rights and precludes the plaintiff from maintaining the instant Title VII action.

3. That before an impartial arbitrator the plaintiff alleged that his discharge was unjust and discriminatory. That the arbitrator's ruling that "plaintiff was discharged for cause" is binding on the plaintiff and precludes the plaintiff from maintaining the instant Title VII action.

The defendant directs this Court's attention to the attached Brief in Support of Motion for Summary Judgment.

WHEREFORE, defendant prays this Court to grant defendant's Motion for Summary Judgment.

Respectfully submitted,

/s/ Robert G. Good
Attorney for Defendant
915 American National Bank Building
Denver, Colorado 80202
222-7956

Address of Defendant:
1727 East 39th Avenue
Denver, Colorado 80205

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[EXHIBIT]

IN THE MATTER OF AN ARBITRATION Between GARDNER-DENVER COMPANY -and- UNITED STEELWORKERS OF AMERICA, LOCAL UNION No. 3029	Grievance involving the discharge of Harrell Alexander, Sr. AWARD OF THE ARBITRATOR December 30, 1969

This matter came on for hearing in Conference Room 8 of the Mountain States Employers Council at 1:30 p.m. on November 20, 1969, before a single arbitrator, Don W. Sears, appointed pursuant to the provisions of Article 23, Section 5, Step 5 of the collective bargaining agreement in effect between the parties at the time the instant grievance arose. This agreement will be referred to hereafter as the Contract.

Gardner-Denver Company, hereafter referred to as the Company, was represented by Mr. Philip R. Moore. United Steelworkers of America, Local Union No. 3029, hereafter referred to as the Union, was represented by Mr. A. J. Frantz.

WITNESSES

For the Company:	Oscar McFarlin, *Assistant Foreman Night Shift* Henry A. Stanley, *Assistant Foreman*
For the Union:	Clyde E. Zietz, *Area Grievance Man* Harrell Alexander, Sr., *Grievant* Earl Colm, *Area Grievance Man* Cletus Baumhover, *President and Chairman, Grievance Committee*

THE ISSUE

Did the Company discharge the grievant for just cause?

BACKGROUND OF THE GRIEVANCE

The grievant, Harrell Alexander, Sr., was employed by the Company in May, 1966. He was assigned to work in the Yard Department. On June 11, 1968, he bid into and was awarded a job as trainee in the Drill Department. He operated Machine No. 793. The training period for this job is twelve months. He was actually on this job fifteen and one-half months before being discharged but he lacked two weeks of completing the twelve month training period, having twice been held back and not given raises to the next labor grade.

On July 18, 1968, the grievant ran 33 parts, of which on 17 of the parts the .1865/.1885 diameter hole was excessively oversized. These 17 parts had to be scrapped. Mr. McFarlin ascertained that the grievant had not checked each part as required by the time study sheet. A warning notice was issued to the grievant. Company Exhibit A.

Mr. McFarlin talked to Clyde Zietz, Area Grievance Man, about the incident and also talked to the General Foreman. Mr. McFarlin then decided to intensify the grievant's training. He spent approximately 80 hours with the grievant demonstrating procedures and details step by step. The testimony indicated that the grievant's work performance improved somewhat after this intensive training and he consulted with Mr. McFarlin concerning his work problems until he received his second warning notice from Mr. McFarlin on May 15, 1969. This notice read as follows:

> "Your scrap as of lately has been terrific. I feel that this is due to carelessness on your part. During the month of April, 1969, you ran 13 pcs of scrap. On 4-30-69 you were drilling S48F-17FB, Oper 6 Lot # 1457. Six of these parts are scrap due to your carelessness. Due to the fact that you neglected to check your work allowing these six parts to go through as good parts when the 3/16" drill broke out."

The grievant then received a two-day suspension on June 5, 1969, for faulty workmanship. Company Exhibit B. Mr. McFarlin testified that several other employees had been suspended for excessive scrap and their work had subsequently improved. Mr. McFarlin said that the grievant's work did not improve after his suspension.

On the night of September 24 or 25, 1969, the grievant

was running a cylinder S-331. He was to drill a vertical hole 1 11/16" in depth. There was testimony that he was spotting the hole and trying to realign the drill in an attempt to get a straight hole. He was not following normal procedure in this regard. On September 30, 1969, he was issued a suspension, subject to discharge, by Mr. McFarlin. He was subsequently recommended for discharge due to defective work. The discharge became effective as of the end of the grievant's shift on Monday, September 29, 1969. See Union's Exhibit 3.

Mr. Henry Stanley, Assistant Foreman, testified that he was on duty on the night of September 24, 1969. He said there was nothing wrong with the grievant's machine on September 23. He said that two weeks before, two new bearings were put in the spindle but that they had nothing to do with the angle of the drill. He testified that the only thing that could cause the resulting angle was improper alignment and forcing the part.

The grievant told Mr. Stanley on the night of September 24, 1969, that the machine was noisy and vibrating and he didn't think it was doing the job. The machine maintenance man, when consulted by Mr. Stanley, said that he would not need a repair order because it only took him 30 seconds to tighten a nut, making the spindle easier to raise. Mr. Stanley testified that even if new bearings were improperly put into the machine, this would not cause the spindle to operate in a crooked fashion.

The instant grievance was filed on October 1, 1969. The parties were unable to resolve this matter at any of the steps in the grievance procedure provided in Article 23 of the Contract; hence they have submitted it to the Arbitrator for his decision on the merits.

Conclusions of the Arbitrator

First, the Arbitrator addresses himself to the question of which party has the burden of proof in establishing its case. Most arbitrators have accepted the view in disciplinary cases that the burden of proof rests upon the Company to show that the discipline was for just cause within the meaning of the Contract. As both parties well know, the Arbitrator accepts this view and has applied it in a long line of cases.

The Arbitrator has concluded that the Company has

proved that the discharge of the grievant was for just cause. If this discharge were found by the Arbitrator on the state of the evidence in this case to be without just cause, then the concept of corrective or progressive discipline as to less serious offenses, so favored by this Arbitrator and by others, would be dealt a severe blow indeed. See, for example, Huntington Chair Corp., 24 LA 490 (1955); Michigan Seamless Tube Co., 24 LA 132 (1955) and Niagara Frontier Transit System, 24 LA 783 (1955), discussed in Elkouri and Elkouri, How Arbitration Works (Revised Edition, 1960) at pp. 423 and 424. As Arbitrator Thompson stated in the latter case, "In industrial practice discipline is often 'progressive' or 'corrective' in nature. Warning is tried before suspension; suspension before discharge. Penalties are designed to correct if possible." (Underlining added for emphasis).

In this case, the grievant was dealt with most patiently. First, a warning notice followed by itensified training; next, another warning notice and oral discussions; then a two-day suspension without pay; and finally termination. Arbitrator Davey held in Sheller Mfg. Corp., 40 LA 890 (1963), that the employer there was justified in taking a similar series of disciplinary actions, culminating in discharge, against an employee for careless workmanship and poor performance. There was evidence in that case, as here, that the employee was told or shown how to do his job correctly on a number of occasions. The evidence also indicated that although he could perform the job correctly, as here he failed to correct his performance after repeated instructions, warnings and cumulative efforts at corrective discipline.

In its written statement presented at the Hearing, the Union challenged the written warning notice of July 18, 1968, the warning notice issued on May 15, 1969, and the two-day suspension of June 6 and June 9, 1969, introducing testimony at the Hearing designed to induce the Arbitrator to discount these various disciplinary actions. However, the Arbitrator is not free to do so. Those earlier disciplinary efforts have already been adjudicated and cannot now be reopened. If the Arbitrator were to reconsider them *de novo* in this proceeding, then non-grieved disciplinary proceedings would become chaotic and, in effect, meaningless when a grievance is later filed concerning a more strict disciplinary action.

The Arbitrator has concluded that the defective work performed by the grievant on the night of September 24 or 25, 1969, was not due to any malfunctioning of Machine #793. There was no probative evidence produced at the Hearing to demonstrate that the corrective maintenance done on the machine was incorrect or faulty or in any way contributed to the defective work produced by the grievant.

There is one matter remaining that troubles the Arbitrator. Mr. Cletus Baumhover, President of the Union, testified that when an employee has habitually run scrap, the Union has agreed to get the employee to transfer out of the department back to his former department when there is an opening. The Arbitrator has no way of knowing if this has been the practice or not. Certainly, this unsupported statement falls far short of proving a well-established past practice. On the other hand, there was no evidence at the Hearing to show that the grievant's performance in the Yard Department was unsatisfactory. All we have in the record is Mr. Schumacher's memorandum of October 2, 1969, to this effect. In this state of affairs, the Arbitrator simply cannot order the grievant to be transferred back to his former department when there is an opening. He *suggests,* nothing more, that the Company and the Union get together in an effort to ascertain if such an arrangement is feasible. However, the Arbitrator wants to make it abundantly clear that this suggestion forms no part of his decision, set out below, and the Company cannot be faulted or criticized by the Union if the Company concludes that such an arrangement is impractical. Had Mr. Baumhover testified as to numerous specific incidents where this kind of transfer had always been granted, the Arbitrator would feel differently.

Decision of the Arbitrator

It is the decision of the Arbitrator that the grievant was discharged for just cause. Consequently, his grievance is denied.

/s/ Don W. Sears, *Arbitrator*

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[EXHIBIT A TO STIPULATION]

COLLECTIVE BARGAINING AGREEMENT

* * *

ARTICLE 4

MANAGEMENT

The Union recognizes that all rights to manage the Plant, to determine the products to be manufactured, the methods of manufacturing or assembling, the scheduling of production, the control of raw materials, and to direct the working forces, including the right to hire, suspend or discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reasons, and the right to maintain order and efficiency are vested exclusively in the Company.

It is understood by the parties that all rights recognized in this Article are subject to the terms of this Agreement.

ARTICLE 5

MUTUAL RESPONSIBILITY

Section 1. The parties agree that during the term of this Agreement there shall be no strike, slow-down or other interruption of production, and that for the same period there shall be no lockout, subject to the provisions of Article 26, Term of Agreement.

Section 2. The Company and the Union agree that there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry. The Company further states and the Union approves that no such discrimination shall be practiced against any applicant for employment.

ARTICLE 6

RULES AND REGULATIONS

Section 1. The Company retains the right to establish and enforce shop rules and regulations. It is understood

that such rules and regulations will not impair or abridge the provisions of this Agreement. Violation of such rules and regulations may be cause for suspension or discharge.

Section 2. Rules and regulations governing employees covered by this Agreement shall be discussed with the Union prior to their effectiveness. Any disciplinary action, taken by the Company pursuant to such rules and regulations, may be made the subject of a grievance.

• • •

SECTION 13—MODIFICATION OF STANDARDS

These standards may be modified at any time by action of the Committee subject to approval by the signatory parties of the Apprenticeship Agreement.

ARTICLE 22

WAGES

Section 1. The job classifications and labor grades as set forth in the Job Evaluation Program are hereby made a part of this Agreement. New or changed jobs will be established in accordance with the Job Evaluation Program.

Section 2. The basic hourly rate of pay for each labor grade shall be as set forth in Appendix "A". Such basic hourly rates of pay shall remain in effect for the duration of the Agreement.

Section 3.

(a) If the National Consumer Price Index—All Cities (1957-1959=100), issued by the U.S. Department of Labor, Bureau of Labor Statistics (hereinafter referred to as the "Index), for the month of May, 1969, exceeds the level of the Index for the month of December, 1968 by 0.5 points or more, then, effective with the first pay period commencing on or after July 16, 1969, each employee will receive a supplemental wage payment equal to one cent (1¢) per hour for each full 0.5 point increase in the level of the Index for May, 1969 over that for December, 1968.

(b) If the Index for the month of May, 1970, exceeds the level of the Index for the month of December, 1969 by 0.4 points or more, then, effective with the first

pay period commencing on or after July 16, 1970, each employee will receive, in addition to any supplemental wage payment in effect under (a) of this Section, a supplemental wage payment equal to one cent (1¢) per hour for each full 0.4 point increase in the level of the Index for May, 1970, over that for December, 1969.

(c) The supplemental wage payments provided for in (a) and (b) of this Section will be paid as an add-on to each hour worked or paid for under this Agreement.

Article 23

ADJUSTMENT OF GRIEVANCES

Section 1. The Grievance Committee shall consist of five (5) employees designated by the Union who will be afforded such time off as may be required:

(1) To attend meetings scheduled between the Company and the Union.

(2) To handle necessary grievance matters within their jurisdiction, but only after first securing permission from their department foreman or supervisor, and then checking out. Notice must also be given to the head of the outside department to be visited.

Section 2. The Union may designate one Assistant Grievance Committeeman to each department, excepting in cases of smaller departments where one Assistant Grievance Committeeman may represent two or more, and in large departments, one for each twenty-five (25) employees, the same applying to each shift. Assistant Grievance Committeemen shall confine their grievance activities to matters arisiny in departments or department under their jurisdiction.

Section 3. The International Representative of the Union certified as such to the Company shall have access to the Plant for the purpose of adjusting a grievance, negotiating the settlement of disputes, investigating working conditions and generally for the purpose of carrying into effect the provisions and aims of this Agreement. Whenever possible, he shall make an appointment in advance for such visits. In any event, the Union Representative shall, on arrival at the Plant, clear through the regular channel of

the Company for receiving visitors, and may be accompanied by a representative of the Company on any visit to the plant.

Section 4. Should a meeting be necessary in the handling of grievances in Step 2 as set forth below, the Company shall call the area grievance committeeman, the assistant grievance committeeman, and the aggrieved employee. Witnesses may be called by joint agreement of the designated Company and Union Representative assigned to handle Step 2 of the grievance procedure. Employees called to such meetings shall be paid at their basic hourly rate or earned rate, whichever is higher, if meetings are called by the Company during working hours. Time spent by Union representatives in Steps 2 and 3 will not be counted in computing the earned rate but will be counted for the computation of overtime if such time spent occurs during the employee's normal work shift.

Section 5. Should differences arise between the Company and the Union as to the meaning and application of the provisions of this Agreement, or should any trouble arise in the plant, there shall be no suspension of work, but an earnest effort shall be made by both the Company and the Union to settle such differences promptly. Grievances must be presented within five (5) working days after the date of the occurrence giving rise to the grievance or they shall be considered waived. Grievances shall be taken up in the following manner; except that any grievance filed by the Local Union shall be submitted in writing at Step 3 of the grievance procedure as set forth herein:

Step 1. An attempt shall first be made by the employee with or without his assistant grievance committeeman (at the employee's option), and the employee's foreman to settle the grievance. The foreman shall submit his answer within one (1) working day and if the grievance is not settled, it shall be reduced to writing, signed by the employee and his assistant grievance committeeman, and the foreman shall submit his signed answer of such grievance.

Step 2. If the grievance is not settled in Step 1, it shall be presented to the Superintendent, or his representative, within two (2) working days after the Union has received the Foreman's answer in

Step 1. The Superintendent or his representative shall submit his signed answer two (2) working days after receiving the grievance.

Step 3. If the grievance is not settled in Step 2, it shall be presented to the manager of Manufacturing or his representative within five (5) working days after the Union has received the Superintendent's answer in Step 2. The Manager of Manufacturing or his representative shall meet with the representatives of the Union to attempt to resolve the grievance within five (5) working days following the presentation of the grievance. The Manager of Manufacturing or his representative shall submit his signed answer within three (3) working days after the date of such meeting.

Step 4. If the grievance is not settled in Step 3, it shall be referred to the Personnel Manager, and/or his representatives, and the International representative and chairman of the grievance committee within five (5) working days after the Union has received the Step 3 answer. Within ten (10) working days after the grievance has been referred to Step 4, the above mentioned parties shall meet for the purpose of discussing such grievance. Within five (5) working days following the meeting, the Company representatives shall submit their signed answer to the Union. The Union representatives shall signify their concurrence or non-concurrence and affix their signatures to the grievance.

Step 5. Grievances which have not been settled under the foregoing procedure may be referred to arbitration by notice in writing within ten (10) calendar days after the date of the Company's final answer in Step 4. Within five (5) days after receipt of referral to arbitration the parties shall select an impartial arbitrator.

Should the parties be unable to agree upon an arbitrator, the selection shall be made by the Senior Judge of the U. S. Circuit Court of Appeals for the Tenth Circuit. The decision of the arbitrator shall be final and binding upon the Company, the Union, and any employee or employees involved. The expenses and fee of the

arbitrator shall be divided equally between the Company and the Union. The arbitrator shall not amend, take away, add to, or change any of the provisions of this Agreement, and the arbitrator's decision must be based solely upon an interpretation of the provisions of this Agreement.

Section 6. (a) No employee will be discharged, suspended or given a written warning notice except for just cause.

(b) Before an employee is discharged, he will be suspended for five (5) working days pending final determination of discipline, and the Company will promptly notify the Chairman of the Grievance Committee in writing of such action. At the request of the Union, a hearing will be held, within three (3) working days after such notice to the Union, before the Plant Superintendent or his representative and the Chairman of the Grievance Committee or his representative. Either party shall have the right to call the aggrieved employee or employees and necessary witnesses. Prior to the close of the five (5) day suspension period, the Company will notify the Union in writing of its final determination of discipline; and the Union may, within three (3) working days after receipt of such notice, file a grievance in writing starting with Step 3 of the grievance procedure.

(c) In cases of suspension (other than suspension pending final determination of discipline as set forth in (b) above) or issuance of a written warning notice, the Company will promptly notify the Chairman of the Grievance Committee in writing of the action taken; and the Union may, within three (3) working days after receipt of such notice, file a grievance in writing starting with Step 2 of the grievance procedure.

(d) Failure to request a hearing or to file a grievance within the time limits set forth in (b) or (c) of this Section will automatically make the disciplinary action taken valid; provided, however, such time limits may be extended by mutual agreement of the Company and the Union.

(e) In any disciplinary proceeding, written warning notices more than two (2) years old will not be considered or submitted as evidence.

(f) If at any time prior to the issuance of an arbitrator's award in a discharge case, it is concluded by the Company that a discharge shall be converted into a suspension with-

out pay, and if this is agreed to by the Chairman of the Grievance Committee or his representative, such suspension shall remain effective for the time agreed upon.

(g) Should it be determined that the employee has been unjustly suspended or discharged the Company shall reinstate the employee and pay full compensation at the employee's basic hourly rate or earned rate, whichever is the higher, for the time lost.

Section 7. The time limits set forth in Section 5 of this Article may be extended by mutual agreement of the Company and the Union.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[EXHIBIT B TO STIPULATION]

October 10, 1969

UNITED STEEL WORKERS OF AMERICA

AFL-CIO

LOCAL #3029

AND TO WHOM IT MAY CONCERN:

On September 24, or there about, Mr. McFarlin the drill foreman being off and Mr. Standley serving his stead- I called his attention to the fact of my discovery of certain apparent irregualarities in machine #793.

The sound of the machine pointed out the fact that the machine was off precision and for that reason would fall short of the perfection expected by the company as well as the exactitude desired by me, the operator of the aforesaid machine.

On receiving this intelligence Mr. Standley called the M&M man, whose name I do not know yet I know him on sight, to inspect the machine and after doing so, he made certain adjustments, but refused to recommend shutting down the aforesaid machine. After which, Mr. Standley, my superior ordered me to continue production on this machine whose realiability I did not trust this I did otherwise my only alternative would have been to run the risk of becoming insubordinate in my relationship to my superior, but when this machine did not produce I was blamed instead of being credited with making a valuable discovery that would have prevented this subsequent unjust and biased indictment.

I am knowledgeable that in the same plant others have scrapped an equal amount and sometimes in excess, but by all logical reasoning I, Harrell Alexander, have been the target of preferential discriminatory treatment.

In the fact of all this, it is known and understood by all that no trainee is given enough time for adequate training,

because the instructor have always had an over load of trainees.

In the light of these facts and within the frame work of the broadest and fairest interpretation of our working agreements, I have every right to *reinstate* in the same position without penalty.

/s/ Harrell Alexander Sr.
HARRELL ALEXANDER SR.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[EXHIBIT C TO STIPULATION]

GRIEVANCE REPORT Exhibit 2

Grievance No: 68-85 Date: Oct. 1, 1969
Employee's Name: Harrell Alexander Clock No. 1426
Date and Time of Grievance: _____

STEP No. 1

Statement of Grievance:

I feel I have been unjustly discharged and ask that I be reinstated with full seniorty and pay.

Harrell Alexander Sr.
Employee

C. A. Baumhover
Committeeman

Decision of Foreman: _____

Grievance Committeeman Foreman
Date

COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-2476

HARRELL ALEXANDER,
PLAINTIFF,
vs.
GARDNER-DENVER COMPANY,
DEFENDANT.

Memorandum Opinion and Order

WINNER, *Judge*

Plaintiff's complaint charges a violation of Title VII of the Civil Rights Act. He says that he was discharged from his employment because "he was a member of the Negro race." After an arbitration held under a union contract (to be discussed later herein) he filed an appropriate complaint with the Equal Employment Opportunity Commission, and, on July 25, 1970, that Commission advised plaintiff that it found no probable cause for plaintiff's charge of discrimination. Enclosed with this advice was a form notifying plaintiff that he had 30 days within which to file suit in a United States District Court. On August 6, 1970, plaintiff filed in this Court, (1) an "Affidavit in support of Motion to Commence Action," and (2) a "Motion to Commence Action Without Payment of Fees and Costs." Acting on these ex parte documents, on August 6, 1970, Chief Judge Arraj entered an order permitting plaintiff to proceed in forma pauperis, appointing counsel for him and allowing 20 days within which to commence the action. The complaint in this Court was filed on August 25, 1970 [more than 30 days after the letter from the EEOC but within the 20 days allowed by the Court]. The case is now before the Court on defendant's summary judgment motion.

Defendant first asserts that the Court is without jurisdiction because the complaint was not filed within 30 days of the finding of lack of probable cause by the Equal Employment Opportunity Commission. Ordinarily, the 30-day time limit is jurisdictional, *Goodman v. City Products Corp.* (6 Cir.) 425 F. 2d 702; *Cunningham v. Litton Industries,*

(9 Cir.) 413 F. 2d 887. However, here the Court accepted the plaintiff's documents for filing, and allowed him 20 days within which to file a complaint. Under these circumstances, the Court believes that plaintiff has complied with the 30-day time limit and that defendant's jurisdictional attack on this ground must fail.

Defendant next says that the Court is without jurisdiction because the Commission did not find reasonable cause to believe that plaintiff's charge was true. This contention was disposed of by Judge Chilson in *Brown v. Frontier Airlines, Inc.*, (D.C. Colo.) 305 F. Supp. 827, and, "We agree and hold that a finding by the Commission, that there is reasonable cause to believe that the charge is true, is not a jurisdictional requirement for the maintenance of an action brought pursuant to Section 2000e-5(e), and that the finding by the Commission in this case that the facts do not constitute a violation of the Act does not deprive this Court of jurisdiction to judicially determine the plaintiff's claim."

With these preliminary questions disposed of, we come to the vital and troublesome issue in the case. Pursuant to the collective bargaining agreement between defendant and its employees, before filing his charges with the Equal Employment Opportunity Commission, plaintiff lodged a grievance under the labor contract. That grievance was arbitrated to Mr. Don W. Sears, the Dean of the University of Colorado Law School. After an evidentiary hearing the arbitrator made written findings and concluded, "that the grievant was discharged for just cause. Consequently, his grievance is denied." The arbitrator's findings do not discuss plaintiff's present assertion of racial discrimination, but Alexander's deposition taken in this case acknowledges that this charge was before the arbitrator, and, on this motion for summary judgment, that deposition has been considered by the Court.

The present posture of the case, then, is that the Commission did not find probable cause that plaintiff's charge of discrimination was true, and, with that same charge of racial discrimination before him, the Dean of the University of Colorado Law School, sitting as an arbitrator, found against plaintiff and found that he was discharged for just cause. We must decide just how many chances plaintiff should be afforded to try to establish his claim of discrimination. We have already held that his failure to

convince the Commission that there was probable cause for his charge does not bar a Title VII action in this Court, and we must now decide whether submitting the matter to arbitration under the labor contract requires the entry of a summary judgment in defendant's favor.

There are two diametric lines of authority. In *Culpepper v. Reynolds Metals Company* (1970) (5 Cir) 421 F. 2d 888, the employee filed a grievance under the union contract. He thereafter sought help from the Equal Employment Opportunity Commission, and the employer claimed that the short statute of limitations created by 42 U.S.C. 2000e-5 had run. The Court held that the statute was tolled by the union grievance procedure, and said:

> "Racial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the 'outer benefits' of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses. Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics.
>
> "This court has held many times that Title VII should receive a liberal construction while at all times bearing in mind that the central theme of Title VII is 'private settlement' as an effective end to employment discrimination. In Oatis v. Crown Zellerback (5 Cir., 1968) 398 F. 2d 496, this court held that:
>
> " 'It is thus clear that there is *great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation.*'
>
> "This view was again voiced in Jenkins v. United Gas Corporation (5 Cir., 1969) 400 F. 2d 28, where this court stated that:
>
> " '* * * EEOC whose function is to effectuate the *Act's policy of voluntary conference, persuasion and conciliation as the principal tools of enforcement.*'
>
> "It would, therefore, be an improper reading of the

purpose of Title VII if we were to construe the statute as did the district court to permit the short statute of limitations to penalize a common employee, who, at no time resting on his rights, attempts first in good faith to reach a private settlement without litigation in the elimination of what he believes to be an unfair, as well as an unlawful, practice. We therefore, hold that the statute of limitations, which has been held to be a jurisdictional requirement, is tolled once an employee invokes his contractual grievance remedies in a constructive effort to seek a 'private settlement of his complaint.' Culpepper also sought to settle his complaint in 1963 through the grievance procedures. We do not think that Congress intended for a result which would require an employee, thoroughly familiar with the rules of the shop, to proceed solely with his Title VII remedies for fear that he will waive these remedies if he follows the rules of the shop or to do both simultaneously, thereby frustrating the grievance procedure."

Hutchings v. United Industries, Inc. (1970) (5 Cir.) 428 F. 2d 303, rules squarely that as a matter of public policy the federal courts cannot be divested of jurisdiction of a Title VII action by any arbitration procedure under a labor contract. Judge Ainsworth there ably sets forth the arguments in support of this view, and he points out that in a Title VII suit, the individual "takes on the mantel of the sovereign." The Court held that "the matters in dispute were subject to the concurrent jurisdiction of the federal courts under the scheme of Title VII and of the grievance-arbitration machinery established by the bargaining contract." It was held:

"In view of the dissimilarities between the contract grievance-arbitration process and the judicial process under Title VII, it would be fallacious to assume that an employee utilizing the grievance-arbitration machinery under the contract and also seeking a Title VII remedy in court is attempting to enforce a single right in two forums. We do not mean to imply that employer obligations having their origin in Title VII are not to be incorporated into the arbitral process. When possible they should be. See generally Gould, Labor Arbitration of Grievances Involving Racial Dis-

crimination, 118 U. Pa. L. Rev. 40 (1969). But the arbitrator's determination under the contract has no effect upon the court's *power* to adjudicate a violation of Title VII rights.

". . . . .

"Title VII outlaws certain forms of discrimination in employment. An important method for the fulfillment of congressional purpose is the utilization of private grievance-arbitration procedures. This comports not only with the national labor policy favoring arbitration as the means for the final adjustment of labor disputes, e.g., Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235, 90 S. Ct. 1583, 26 L. Ed. 2d 199, but also with the specific enforcement policy of Title VII that discrimination is better curtailed through voluntary compliance with the Act than through Court orders. Congress, however, has made the federal judiciary, not the EEOC or the private arbitrator, the *final* arbiter of an individual's Title VII grievance. See Fekete v. United States Steel Corp., 3 Cir. 1970, 424 F. 2d 331. The EEOC serves to encourage and effect voluntary compliance with Title VII. So also may the private arbitrator serve consistent with the scope of his authority. Neither, however, has the power to make the ultimate determination of Title VII rights.

"In this case, we conclude that the District Court erred in holding that Hutchings was bound by the arbitrator's adverse determination regarding the October denial of a promotion and by settled 'third step' determination regarding the February denial. If the doctrine of election of remedies is applicable at all to Title VII cases, it applies only to the extent that the plaintiff is not entitled to duplicate relief in the private and public forums which would result in an unjust enrichment or windfall to him. Bowe v. Colgate-Palmolive Company, 7 Cir., 1969, 416 F. 2d 711. Hutchings, of course, has received nothing to date. Since this case involves Hutching's assertion of his Title VII rights, while the grievance and arbitration proceedings involved his assertion of contract rights, res judicata is inapplicable to this proceeding."

At the opposite pole is *Dewey v. Reynolds Metal Company*, (1970) (6 Cir.) 429 F. 2d 324. There Judge Weick, speaking for a divided Court said:

> "It is clear that if the arbitrator of the grievances had granted an award to Dewey, instead of to Reynolds, the award would have been final, binding and conclusive on Reynolds. Reynolds would not have been permitted to relitigate the award in the courts. This is the teaching of the United Steelworkers trilogy, which clearly defined the respective functions of the courts and the arbitrator. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 to 602, 80 S. Ct. 1343 to 1347, 4 L. Ed. 2d 1403 to 1408, 363 U.S. 574 to 592, 80 S. Ct. 1347 to 1358, 4 L. Ed. 2d 1409 to 1423, 363 U.S. 593 to 602, 80 S. Ct. 1358 to 1363, 4 L. Ed. 2d 1424 to 1431 (1960); Washington v. Aerojet-General Corp., 282 F. Supp. 517 (C. D. Cal., 1968).
>
> "In *Steelworkers*, the Court said:
>
> > "'When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal.' (Id. at 569, 80 S. Ct. at 1347)
>
> "The arbitrator had jurisdiction to determine the grievances. The arbitration involved an interpretation of the collective bargaining agreement with respect to Dewey's claims that he had been laid off and discharged because of his religious beliefs. In arbitration proceedings, frequently questions of law and fact are resolved by the arbitrator. Where the grievances are based on an alleged civil rights violation, and the parties consent to arbitration by a mutually agreeable arbitrator, in our judgment the arbitrator has a right to finally determine them. Any other construction would bring about the result present in the instant case, namely, that the employer, but not the employee, is bound by the arbitration.
>
> "This result could sound the death knell to arbitration of labor disputes, which has been so usefully employed in their settlement. Employers would not be inclined to agree to arbitration clauses in collective bargaining

agreements if they provide only a one-way street, i.e., that the awards are binding on them but not on their employees.

"The tremendous increase in civil rights litigation leads one to the belief that the Act will be used more frequently in labor disputes. Such use ought not to destroy the efficacy of arbitration.

"In the supplemental brief of EEOC as amicus curiae, the case of Smith v. Evening News Ass'n, 371 U.S. 195, 197-198, 83 S. Ct. 267, 9 L. Ed. 2d 246 (1962), is cited for the proposition that 'the complainant is not required to elect between his contractual rights or his statutory rights but may seek to vindicate his claim in contractual and statutory proceedings.' (EEOC Supp. Brief, p. 3) The writer of the brief neglected to state that the collective bargaining agreement in *Evening News* contained no grievance arbitration procedure which had to be exhausted before recourse could be had to the courts. 371 U.S. 196, fn 1, 83 S. Ct. 267.

"The question in our case is not whether arbitration and resort to the courts could be maintained at the same time; rather our case involves the question whether suit may be brought in court *after* the grievance has been finally adjudicated by arbitration.

"We see no good analogy between jurisdiction of the National Labor Relations Board and that of EEOC. The Labor Board has adjudicatory powers over unfair labor practices, subject only to judicial review. Orders of the Board may be vacated on review only when they are not supported by substantial evidence upon consideration of the record as a whole. EEOC, on the other hand, has no such power. The District Court considers EEOC cases do novo. The legislative history, from which we have previously quoted, indicates the reason for the difference.

"Nor do we find any national policy for ousting arbitrators of jurisdiction to finally determine grievances initiated by employees, based on alleged violation of their civil rights."

On rehearing, Judge Combs, who had filed the dissenting

opinion, had resigned, and, with Judge McCree dissenting, Judge Weick added to his earlier opinion a discussion of *Culpepper, Hutchings, United Steel Workers Trilogy,* 363 U.S. 564, and *Boys Markets,* 398 U.S. 235. He there said:

"The case of Culpepper v. Reynolds Metals Co., 421 F. 2d 888 (5th Cir. 1970), is relied on in support of the proposition that an employee may utilize both arbitration and an action under Title VII of the Civil Rights Act. In Culpepper, however, only a grievance was filed, which was never processed through arbitration. *Culpepper* involved racial discrimination, which a majority of the panel thought was so serious as to impose—

"'* * * the duty on the courts to make sure that the Act works. * *'

"Circuit Judge Coleman, who filed a concurring opinion, disagreed rather vigorously that any such duty was imposed on the Courts. He stated:

"'Under our Constitutionally ordained form of Government, whether an Act works or fails is the concern of the Executive or Legislature, or both—not the courts.'

"We do not regard it as our function to enlarge on the plain language of a statute so as to impose on citizens obligations never intended by Congress, in order to make it work.

"Great reliance is placed upon Hutchings v. United Industries, Inc., 428 F. 2d 303 (5th Cir. 1970), which was decided after our decision in the present case was announced. In our opinion Hutchings does not comport with Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 90 S. Ct. 1583, 26 L. Ed. 2d 199 (1970).

"In *Boys Markets,* Mr. Justice Brennan emphasized the importance of arbitration in the settlement of labor disputes. He said:

"'However, we have frequently noted, in such cases as *Lincoln Mills,* [353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972] the *Steelworkers* [363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403] *Trilogy,* and *Lucas Flour*

[369 U.S. 95, 82 S. Ct. 571, 7 L. Ed. 2d 593] the importance which Congress has attached generally to the voluntary settlement of labor disputes without resort to self-help and more particularly to arbitration as a means to this end. Indeed, it has been stated that *Lincoln Mills*, in its exposition of § 301 (a), "went a long way towards making arbitration the central institution in the administration of collective bargaining contracts."

'The *Sinclair* [370 U.S. 195, 82 S. Ct. 1328, 8 L. Ed. 2d 440] decision, however, seriously undermined the effectiveness of the arbitration technique as a method peacefully to resolve industrial disputes without resort to strikes, lockouts, and similar devices. Clearly employers will be wary of assuming obligations to arbitrate specifically enforceable against them when no similarly efficacious remedy is available to enforce the concomitant undertaking of the union to refrain from striking.' [footnote omitted.]

"Similarly, employers would be wary of arbitration clauses in collective bargaining agreements if, as in the present case, the arbitration is binding on them only and not on their employees.

"Our case is even stronger than *Boys Markets* because the grievance here was submitted to arbitration and the arbitrator made an award which was final, binding and conclusive on the parties. It is as binding as a judgment. 5 Am. Jur. 2d Arbitration and Award, § 147. It remains in full force and effect.

"The amicus brief of NAACP Legal Defense Fund candidly recognizes that '[i]t may be true that the result of such an accommodation will be that the employer but not the employee will be bound by the decision of the arbitrator.' (Brief, p. 14).

"We know of no good reason why an award of an arbitrator should not be binding on both parties, the same as a judgment of a court.

"It is difficult for us to believe that any employer would ever agree to arbitration of a grievance if he knew that the employee would not be bound by the result.

"The importance of arbitration in the resolution of all labor disputes is the theme of the United Steel Workers Trilogy, 363 U.S. 564-602, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960). The purpose of arbitration is thwarted if the awards are held by the courts to be binding on employers only and not on employees."

Certiorari was granted in *Dewey*, but on June 1, 1971, the Supreme Court announced an affirmance of the case by an equally divided Court with Justice Harlan not participating —U.S.—.[1]

Faced with this dichotomy of authority, we adopt in their entirety the views of Judge Weick expressed in *Dewey v. Reynolds Metals Company*, supra. We hold that when an employee voluntarily submits a claim of discrimination to arbitration under a union contract grievance procedure —a submission which is binding on the employer no matter what the result—the employee is bound by the arbitration award just as is the employer. We cannot accept a philosophy which gives the employee two strings to his bow when the employer has only one. Congress has given the employee one and one-half strings under the Equal Employment Opportunity procedure. It is true that the Commission can enter no order binding on the employer, but with a finding of probable cause, reserving to the employee the right to sue, he is given the assistance of an agency of the United States Government in attempting to bring about a settlement of the claimed discrimination. This amounts to a half string.

In *Boys Markets*, Justice Brennan stressed the important public policy of promoting private, peaceful settlement of disputes between labor and management. To hold that an employee has a right to an arbitration of a grievance which

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[1] Other cases emphasizing the divergent views of the Courts on this question are: *Bowie v. Colgate Palmolive Co.* (1969) (7 Cir.) 416 F. 2d 711; *Younger v. Glamorgan Pipe and Foundry Co.* (1969) (D.C.W.D. Va.) 310 F. Supp. 195; *McGriff v. A. O. Smith Corp.* (1971) (D.C. S.C.) 3 CCH-EPD ¶ 8124; *Voutsis v. Union Carbide Co.* (1971) (D.C. S.D. N.Y.) 321 F. Supp. 830; *Washington v. Aerojet General Corp.* (1968) (D.C.C.D. Calif.) 282 F. Supp. 517; *Fekete v. U.S. Steel Corp.* (1969) (D.C. W.D. Pa.) 300 F. Supp. 22); *Newman v. Avco Corp.* (1970) (D.C. M.D. Tenn.) 313 F. Supp. 1069; *Oubichon v. North American Rockwell Corp.* (1970) (D.C. C.D. Calif.) 3 CCH-EPD ¶ 8071, and cases cited in *Culpepper, Hutchings and Dewey.*

is binding on an employer but is not binding on the employee—a trial balloon for the employee, but a moon shot for the employer—would sound the death knell for arbitration clauses in labor contracts. Such a result would bring to a tragic end the many years of effort which have brought about the now prevailing arbitration procedures to resolve labor disputes. The vital importance of the rights protected by the Civil Rights Act must not be overlooked, but it is the employee who elected arbitration. His was a voluntary choice, and he should be bound by it. The Constitution and Title VII demand equality; neither requires preferential treatment of minorities. Chief Justice Burger's opinion in *Griggs v. Duke Power Co.*, (1971) 401 U. S. 424, can be read in no other way.

Defendant's motion for summary judgment is granted.

Dated at Denver, Colorado, this 1st day of July, 1971.

/s/ Fred M. Winner
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

HARRELL ALEXANDER,
PLAINTIFF

vs.

GARDNER-DENVER COMPANY,
DEFENDANT

Civil Action No.
C-2476

JUDGMENT

Pursuant to and in accordance with the Memorandum Opinion and Order signed by Judge Fred M. Winner on July 1, 1971, in the above entitled matter, and filed in this office on July 7, 1971.

IT IS HEREBY ORDERED that the action and complaint herein be and hereby are dismissed, and that the Defendant shall have and recover from the Plaintiff its costs, upon the filing of a Bill of Costs with the Clerk of this Court.

DATED AT DENVER, COLORADO, this 12th day of July, 1971.

G. WALTER BOWMAN, CLERK

/s/ James R. Manspeaker
JAMES R. MANSPEAKER
Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY, 1972, TERM

HARRELL ALEXANDER, SR.,
PLAINTIFF-APPELLANT,

v.

GARDNER-DENVER COMPANY,
a Delaware Corporation,
DEFENDANT-APPELLEE.

No. 71-1548

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

(District Court No. C-2476)

HENRY V. ELLWOOD, Denver, Colorado, for Plaintiff-Appellant.

ROBERT G. GOOD, Denver, Colorado, for Defendant-Appellee.

Before HILL and BARRETT, *United States Circuit Judges*, and LANGLEY, *United States District Judge*.

PER CURIAM.

This appeal is from the granting of defendant-appellee's motion for summary judgment, by the United States District Court for the District of Colorado, in a civil action filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., alleging racially motivated discriminatory employment practices by Gardner-Denver Company. Three grounds were advanced by Gardner-Denver in support of its motion. The first two bases challenged the timelinesss of plaintiff's filing suit, and the trial court's jurisdiction following a finding of the Equal Employment Opportunity Commission (EEOC) of no reasonable cause to believe that Gardner-Denver had engaged in unlawful employment practices. These were decided adversely to Gardner-Denver. The third proposition asserted that submission of the employment grievance to an impartial arbitrator precluded Alexander from maintaining a Title VII civil action and that the decision of the arbitrator was binding. This was decided adversely to Alexander and forms the basis of his appeal.

Harrell Alexander, a Negro, was employed by Gardner-Denver for over three years. He had advanced to a trainee's position in the drill department. He had been awarded this position on June 11, 1968, after having been employed for over two years by appellee, and had held this same position until he was discharged on September 29, 1969. The reason assigned was Alexander's poor performance as a drill press trainee, as evidenced by his accumulations of excessive amounts of scrap.

The collective bargaining agreement provided that an employee who believed Gardner-Denver had disregarded the labor agreement could lodge a protest within five days of the asserted breach. Alexander filed his grievance, and it was denied by Gardner-Denver. Further, pursuant to the Union Agreement provision for adjustment of grievances, the matter was submitted to arbitration. The arbitrator concluded the discharge was for just cause following a series of progressive industrial disciplinary practices. The issue of racially-motivated discriminatory employment practices was presented to the arbitrator and rejected.

Alexander had filed a formal complaint of racial discrimination with the Colorado Civil Rights Commission on October 27, 1967, prior to the arbitration hearing. That commission failed to act on the complaint, and Alexander filed a charge of discrimination with the EEOC. On July 24, 1970, the EEOC informed Alexander that the facts did not constitute a Title VII violation and dismissed the charge. The EEOC advised that a suit, if filed, must be commenced within 30 days. On August 6, 1970, the trial court permitted Alexander to proceed in forma pauperis, appointed counsel to represent him, and allowed 20 days in which to commence the action. The complaint was filed on August 25, 1970, beyond the 30-day period following the EEOC determination but within the 20-day period permitted by the court. The motion for summary judgment was filed on February 12, 1971, and granted by the trial court's memorandum opinion and order on July 7, 1971, on the ground previously discussed, that is, that the matter had been submitted to arbitration and the arbitrator's decision was binding on both parties.

The issue before us on appeal involves the correctness of the trial court's decision to uphold the decision of the arbitrator and to deny Alexander recourse of civil action in a federal district court following the adverse decision

by the arbitrator. We have examined the trial court's opinion and order in its disposition of the motion for summary judgment and find it exhaustive of the authorities and conclusive in resolution of the issue.

The judgment is therefore affirmed on the basis of the trial court's opinion and order, as reported.[1]

[1] Harrell Alexander, Sr. v. Gardner-Denver Co., —— F. Supp. —— (D.C. Colo. 1972).

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JULY TERM—AUGUST 11, 1972

Before HONORABLE DELMAS C. HILL and HONORABLE JAMES E. BARRETT, *Circuit Judges;* and HONORABLE EDWIN LANGLEY, *District Judge.*

HARRELL ALEXANDER, SR.,
PLAINTIFF-APPELLANT,

v.

GARDNER DENVER COMPANY,
a Delaware Corporation,
DEFENDANT-APPELLEE.

No. 71-1548

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

On consideration whereof, it is ordered that the judgment of said court is affirmed.

HOWARD K. PHILLIPS, *Clerk.*
By Helen R. Bartha
Deputy Clerk.

SUPREME COURT OF THE UNITED STATES

No. 72-5847

HARRELL ALEXANDER, SR., PETITIONER,

v.

GARDNER-DENVER COMPANY

On petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

FEBRUARY 20, 1973

☆ U.S. Government Printing Office: 1973—499-671/394

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5847

HARRELL ALEXANDER, SR.,
Petitioner

v.

GARDNER-DENVER COMPANY,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

PAUL J. SPIEGELMAN
RUSSELL SPECTER
Specter & Spiegelman
P.O. Box 4887
Washington, D.C. 20008
HENRY V. ELWOOD
Lewis, Jones & Elwood
1839 York Street
Denver, Colorado 80206
Attorneys for Petitioner

Washington, D.C. • THIEL PRESS • (202) 393-0625

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v.

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Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 466 F.2d 1209 (10th Cir. 1972), and appears at pages 45-47 in the Appendix. The District Court opinion appears in the Appendix at pages 33-43 and is reported in 346 F. Supp. 1012 (D. Colo. 1971).

STATUTORY PROVISIONS INVOLVED

This suit was brought pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e et seq. Also involved is section 203(d) of the National Labor Relations Act, 29 U.S.C. §173(d).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on August 11, 1972, affirming, *per curiam*, the district court's dismissal of Petitioner's claim ordered on July 7, 1971. On November 4, 1972, Mr. Justice White signed an order extending the time for filing this petition for certiorari to and including December 8, 1972. The petition was filed on December 8, 1972 and was granted on February 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether an employee who claims he has been the victim of racial discrimination and pursues both his contractual remedies by filing a grievance and his federal rights by filing administrative charges under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. is precluded from maintaining an action in federal court as a result of an unfavorable arbitration decision entered *after* filing Title VII charges?

2. What are the appropriate standards to be applied by the district courts in those cases in which an employee has protested allegedly improper conduct of his employer both by filing a grievance under the collective bargaining agreement and by filing charges of racial discrimination pursuant to Title VII of the Civil Rights Act of 1964?

STATEMENT OF THE CASE

Petitioner Harrell Alexander, a black man, was employed by defendant-appellee from May of 1966 until his discharge on September 29, 1969. Petitioner was hired for work in the Yard Department and, on June 11, 1968, was assigned to a trainee's position in the Drill Department. It was from this latter position that he was fired.

On September 29, 1969, the company discharged Petitioner allegedly because his performance was poor in that he had accumulated an excessive amount of scrap. Pursuant to the contractual grievance procedure, Petitioner, on October 1, 1969, filed a grievance which stated that "I feel that I have been unjustly discharged and ask that I be reinstated with full seniority and pay." (App. 32) The grievance did not allege that race was the reason for the discharge.[1]

The Company denied the grievance at Steps 1 through 4 of the process. The issue of racial discrimination was not raised by the Union, acting on behalf of the grievant, at any of these intermediate Steps in the grievance procedure. (App. 11-12)

Failing to resolve the grievance by direct discussion, the matter was taken to arbitration. The scope of the arbitrator's authority is set out in the contract in Section 5 of Article 23:

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[1] Article 5 of Section 2 of the Collective Bargaining Agreement contains an "anti-discrimination" clause, but there is nothing in the record to indicate that the petitioner's grievance was under this clause. Rather, the grievance appears to have been filed under Section 6(a) of Article 23 which provides: "No employee will be discharged, suspended, or given a written notice except for just cause." (App. 28)

"The arbitrator shall not amend, add to, or change any of the provisions of this Agreement, and the arbitrator's decision must be based solely upon the interpretation of the provisions of this Agreement." (App. 28)

At the arbitration hearing, held on November 20, 1969, the only mention of the issue of racial discrimination occurred when the Union recited a written statement previously prepared and sent to the Union by the grievant on October 10, 1969. (App. 13). The only portion of that statement which could possibly be interpreted to refer to racial discrimination is as follows:

"I am knowledgeable that in the same plant others have scrapped an equal amount and sometimes in excess but by all logical reasoning, I, Harrell Alexander, have been the target of preferential discriminatory treatment." (App. 30)

Petitioner contended that at the hearing his Union representative "rearranged" this statement and "weakened it down". (App. 13)

At both the arbitration hearing and at the earlier hearing Steps, Petitioner was not represented by his own counsel or by an attorney assigned by the Union. He was represented by Union officials. At Step 4 of the grievance process, but not at the arbitration hearing, Petitioner was accompanied by his pastor. (App. 12).

Petitioner felt that the Union was not representing his interests in the grievance process, especially as to his feeling that he was discharged because of his race. (App. 13-14) He also acknowledged that he was incapable of representing himself. (App. 14) For this reason before the grievance process reached the arbitration stage, Petitioner filed a formal complaint of racial discrimination under the provisions of the Colorado Civil Rights Act because

he believed the Union would not represent his interests with respect to his belief that he had been discriminated against because of his race. (App. 14)

The EEOC assumed jurisdiction over Petitioner's administrative charges of racial discrimination on November 5, 1969. In the charge filed with EEOC, Petitioner alleged that he was discharged when white employees, similarly situated, were retained as employees.

The arbitrator issued his decision on December 30, 1969. The decision occurred after the Colorado Civil Rights Commission had terminated proceeding and after the Petitioner's EEOC charge had been pending with the Federal Commission for over five weeks. The arbitrator, without commenting on or even acknowledging there was a racial discrimination issue in the case, held that Petitioner was discharged for good cause. The arbitrator noted that the Union failed to present any evidence in support of the Petitioner's claim that as to all employees there existed an historic shop practice to transfer, rather than discharge, an employee who accumulated excessive scrap. (Arb. Dec. pg. 5) (App. 22) Based on the allegation that such a practice existed, the arbitrator "suggests, nothing more, that the Company and the Union get together in an effort to ascertain" whether petitioner could be reinstated in the job he held prior to entering the training program (*ibid.*).

Upon failure of the EEOC to find reasonable cause to credit the charge of discrimination, the Commission issued to the Petitioner a "Notice of Right to Sue." Petitioner sought and was granted appointed counsel and suit was authorized without payment of fees, cost, and securities. Thereafter suit was filed, and on defendant's motion for summary judgment, the district court granted summary judgment and dismissed the action on the sole ground that petitioner's pursuit of his contractual

remedies to final arbitration award barred his cause of action under Title VII of the Civil Rights Act of 1964. In doing so, the district court did not consider the adequacy of the arbital process, either substantively or procedurally, nor did it even analyze whether the issues presented to the arbitrator were the same as those presented to the court. Rather, it made the sweeping holding that "when an employee voluntarily submits a claim of discrimination to arbitration . . .–a submission which is binding on the employer no matter what the result–the employee is bound by the arbitration award just as is the employer." In doing so the district court purported to rely on *Dewey v. Reynolds Metals Co.*, 429 F.2d 364 (6th Cir. 1970) aff'd by an equally divided Court 400 U.S. 1008 (1970).

On appeal to the Court of Appeals for the Tenth Circuit, the Equal Employment Opportunity Commission filed an extensive *amicus* brief in support of Petitioner's position that in the circumstances of his case, he should not be barred from pursuing his federal remedies. Nonetheless, the Tenth Circuit affirmed the district court in a *per curiam* opinion, which adopted the district court's opinion without even discussing the issues raised and authorities cited by Petitioner and EEOC in their respective briefs and without stating independent reasons or analysis. Thus, the case stands before this Court in a procedural posture in which it must be assumed that Petitioner has a litigable claim of racial discrimination under Title VII of the Civil Rights Act of 1964 which the courts below have refused to hear solely because of the arbital award.

SUMMARY OF ARGUMENT

The decisions of the courts below deny petitioner the opportunity to present the merits of his statutory claim of racial discrimination to the federal courts solely because of the arbitration decision on his contractual claim. The issue underlying these decisions—the effect of the utilization of the arbital process on an individual's right to pursue statutory remedy for discrimination in employment for reasons prohibited by Title VII of the Civil Rights Act of 1964—is one which has caused division in the lower federal courts.[2] The conflict and confusion

[2] See *Hutchings v. U.S. Industries*, 428 F.2d 303 (5th Cir. 1970) (unfavorable arbitration award does not bar later Title VII charge and suit); *Bowe v. Colgate Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969) (parallel prosecution in court and through arbitration is permissable as long as duplicate relief or unjust enrichment does not result); *Fekete v. U.S. Steel Corp.*, 424 F.2d 331 Fn. 3 (3rd Cir. 1970) (arbitration award does not render moot a continuing violation of Title VII); *Rios v. Reynolds Metals*, 467 F.2d (5th Cir. 1972) (deference to arbitration award only proper where adequate safeguards are made to assure public interest is served); *Dewey v. Reynolds Metals Corp., supra* (Title VII remedy barred by unfavorable arbitration award); *Spann v. Joanna Western Mills*, 446 F.2d 120 (6th Cir. 1971) ("pursuit of arbitration, without some simultaneous use of court or agency processes, precluded judicial jurisdiction to enter review the arbitrator's decision"); *Newman v. Avco Corp.*, 451 F.2d 743 (6th Cir. 1971) (unfavorable award does not bar Title VII where grievance machinery and Title VII rights are pursued simultaneously); *Thomas v. Philip Carey Mfg. Corp.*, 455 F.2d 911 (6th Cir. 1971) (favorable arbitration award bars Title VII claim).

The issue has also caused considerable comment among the commentators. See e.g. Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration under Title VII*, 69 Mich. L. Rev. 599 (1970); Gould, *Racial Equality In Jobs and Unions, Collective Bargaining, and the Burger Court*, 68 Mich. L. Rev. 237 (1969);

among the circuits will continue until this Court definitively resolves the issue and sets forth standards for the lower courts to apply. For this reason, we deal below first with the overall issue of the appropriate rule of law to be applied in these cases and then deal with the specific circumstances of this case.

I.

A Rule Which Precludes the Federal Courts from Hearing the Merits of a Claim of Race, Sex, National Origin or Religious Discrimination Because the Claimant Has Pursued His Contractual Rights To Utilize the Grievance-Arbitration Machinery Is Contrary to the Intent of Congress and Is Unwise as a Matter of Policy.

A. Congress Has Made the Federal Courts the Final Arbiter of Claims of Racial Discrimination.

1. The private charge and private right of action in federal court are central to the enforcement scheme under Title VII. Congress has given federal courts a special responsibility to effectuate the policies embodied in Title VII.

2. The public policy against employment discrimination is so strong that Congress and the Executive have fashioned a variety of remedies which are parallel and

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Gould, *Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*, 79 Yale L. Rev. 46 (1969); Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. Penn. L. Rev. 40 (1969); Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. Chi. L. Rev. 30 (1972); Platt, *Practical Problems in Handling of Grievance and Arbitration Matters*, 3 Ga. L. Rev. 398 (1968); Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Har. L. Rev. 1109, 1222 (1971); Blumrosen, *Labor Arbitration, EEOC Conciliation and Discrimination in Employment*, 25 Arbitration Journal 88 (1970).

overlapping. These remedies are intended to supplement each other and not preclude the others. The arbitration process has not been given the special status under Title VII that it has under the Labor Act and is certainly entitled to no greater deference than any of the other remedies for employment discrimination.

B. The Differing Purposes of Title VII and the Arbitration Process Make Arbitration an Inappropriate Mechanism in Which To Entrust Ultimate Responsibility for Enforcing the National Policy Against Employment Discrimination.

1. The purpose of arbitration is to reinforce the collective bargaining process and promote industrial harmony even at the expense of minority rights; it is an important mechanism under the National Labor Relations Act for achieving these ends. Nonetheless, the National Labor Relations Board does not preclude itself from hearing an unfair labor practice charge which has been the subject of an arbitration award. Surely, under Title VII, with its emphasis on individual and minority group rights, arbitration is entitled to no greater deference than it is given by the Labor Board.

2. The very nature of the arbitration process makes it an inappropriate mechanism for resolving employment discrimination claims. The process owes its existence to the collective bargaining agreement—an agreement which may itself violate Title VII. This results in a conflict of interest between the union which processes the grievances and the grievant who may have Title VII claims against the union; it also presents grave problems to the arbitrator, who may have conflicts of his own and who is limited in his authority to decide issues and order remedies in conflict

with the provisions of the agreement. This situation is exacerbated by the fact that the grievant is usually not represented by his own counsel but must rely on the union to process the claim. Moreover, the need to make the arbitration process speedy and inexpensive requires procedural shortcuts such as no discovery procedures, no adherence to formal rules of evidence, no cross examination, no swearing of witnesses and no fact finding which make the process unreliable as a means of resolving the complex issues of fact in employment discrimination cases.

II.

The National Policy Against Racial Discrimination in Employment and the National Labor Policy Can Best Be Served by Giving an Arbital Award Only Such Evidentiary Weight as It Deserves.

It is clear that the public interest in *ending* employment discrimination is best served by having a federal court examine on the merits all such claims. If reasons are to be found which require the federal courts to defer to arbital awards, these must be reasons other than the policy against racial and other forms of employment discrimination. The reasons advanced for undermining the federal policy against employment discrimination–the burden on the employer of being bound by arbitration when the employee is not and the assertion that employers will lose incentive to enter into arbitration clauses–are not substantial enough reasons for overriding this "highest priority" policy. It is simply absurd to suggest that giving a lowly David (the employee) two opportunities to take on Goliath (the employer) will give David an unfair advantage over Goliath. The employer's reason for entering into an

arbitration clause is the *quid pro quo* of a no strike clause; thus there is little danger to the arbitration process from making it non-binding with respect to employment discrimination claims. Indeed, the grievance machinery will be reinforced by a rule which encourages employees to use it without fear of losing Title VII rights.

III.

Deferral to the Arbital Award in the Instant Case Would Be Improper and Unfair.

In the instant case, petitioner filed his Title VII charges prior to the arbitration hearing; he informed the arbitrator that his claim of racial discrimination was before appropriate administrative agencies and he complained that the union did not adequately present his claim to the arbitrator. The arbitrator decided that petitioner was discharged for just cause, but did not decide any issue of racial discrimination. He specifically noted that no evidence was presented on the issue of prior shop practice which was crucial to a determination of the discrimination issue. These circumstances highlight the deficiencies of using the arbital process for the purpose of resolving Title VII claims. To defer to the arbital award in this case would be manifestly unwise and unjust.

ARGUMENT

The decisions of the district court and the court of appeals are inconsistent with the decisions of other courts which have addressed themselves to this question and elevate the private relief system of a collective bargaining agreement over the protection of the public interest embodied in Title VII of the Civil Rights Act of 1964. The decision is in conflict not only with those of other courts in cases arising under Title VII, but also with

decisions of this court dealing with the interplay of rights and remedies arising under labor agreements and also under federal law. For, as we shall show below, despite the continued emphasis upon the use and finality of arbitration of matters arising under labor agreements, this Court has steadfastly held that where contract rights and rights involving the public interest arising under statute co-exist or overlap, the adjudicating authority created by statute always has the right and the responsibility to make final decision *in the protection of the public interest. Carey v. Westinghouse,* 375 U.S. 261 (1961); *Smith v. Evening News Association,* 371 U.S. 145 (1962). The decision of the arbitrator is afforded such weight as it may deserve under the circumstances of the particular case, but in no case may the mere fact of arbitration oust the adjudicating authority of its jurisdiction, or its right to disagree with the arbitrator.[3]

Moreover, to the extent that these cases announce a rule which allows arbitrators such power over other claims of race, sex, national origin, and religious discrimination, they strike at the very heart of the federal apparatus for enforcing the laws against employment discrimination—the private charge of discrimination; it is the private charge which sets in motion almost all of the efforts by the executive and judicial branches of the federal government aimed at ending racial and other forms of employment discrimination.

We show below that the serious detrimental effect on enforcement of the laws against racial discrimination is

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[3]In the instant case, since the matter of racial discrimination was not even before the arbitrator, it is clear that the lower courts were relying solely on the fact that arbitration occurred. This degree of commitment to the arbital process manifestly overstates the case for arbitration. See, *Carey v. Westinghouse,* supra.

contrary to the intent of Congress, unwise as a matter of policy and unjustified by any substantial countervailing interests. Our position is that any rule precluding a federal court from hearing on a charge of employment discrimination because of an arbital award should not be allowed. We will first show that the position taken by the courts below—that the federal courts are without power to adjudicate charges of employment discrimination which have previously been the subject of an arbitration award—is unacceptable. We will then demonstrate that there are no circumstances under which pursuit of grievance machinery to arbitration should prevent a federal court from reaching the merits of a charge of employment discrimination. Finally, we consider the specific circumstances of the instant case which make the decisions of the courts below to deprive Petitioner of his day in court manifestly unjust.

I.

AN ARBITRATION AWARD SHOULD NOT PRECLUDE A PRIVATE RIGHT OF ACTION IN FEDERAL COURT.

A. Congress Made the Federal Courts the Final Arbiter of Claims of Racial Discrimination and Entrusted Them With the Responsibility of Enforcing This Policy.

1. *The Importance of the Private Right of Action in Federal Court*

The courts below have failed to carry out the responsibilities placed upon federal courts by Congress to execute the national policy against racial discrimination in employment embodied in the Civil Rights Act of 1964. Since the passage of Title VII, the private right of action has been and still is the principal means of enforcing the federal laws against racial discrimination. Indeed, prior to

the recent 1972 amendments to Title VII, a law suit by a private party was the only method of gaining enforcement of these laws. Thus, as the court stated in *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir. 1969):

> "The suit is between private parties. The burden of enforcement rests on the individual through his suit in Federal District Court. But charges must first have been filed with EEOC. Consequently, the filing charges and the giving of information by employees is essential to the Commission's administration of Title VII, the carrying out of the congressional policy embodied in the Act and the invocation of the sole sanction of Court compulsion through employee instituted suit."

And as the Court of Appeals for the Second Circuit recently noted, the private suit under Title VII remains an important part of the enforcement process even now that EEOC has been granted enforcement powers:

> "Under Title VII since its inception, moreover, the individual has played a significant role in its enforcement. *Jenkins v. United Gas Corp.*, 400 F.2d 28, 32 (5th Cir. 1968). This is equally true after the amendment of Title VII by the Equal Employment Opportunity Act of 1972, 1972 U.S. Code Cong. & Ad. the Equal Employment Opportunity Commission to bring a Title VII suit in the name of the Government, individuals party to Commission conciliation proceedings in the same action may intervene in such suits, and in those brought by the Attorney General, *id.* §706(f)(1), 1972 U.S. Code Cong. & Ad. News 817-18 and presumably individuals not party to the Commission proceedings may institute a suit despite any legal action taken by the Commission or the Attorney General." *Williamson v. Bethlehem Steel Co.*, 468 F.2d 1201, 1204 (2d Cir. 1972) (Footnote omitted.)

Moreover, even with its new enforcement powers, EEOC is dependent primarily upon private charges of discrimination to initiate its processes.[4]

The various courts of appeals have vigorously responded to the responsibilities placed upon them by Congress. *Culpepper v. Reynolds Metals*, 421 F.2d 888 (5th Cir. 1970) ("It is . . . the duty of the courts to make sure that the Act works and the intent of Congress is not hampered by a combination of strict construction and a battle with semantics"); *Jenkins v. United Gas*, 400 F.2d 28 (5th Cir. 1968) (Federal court which fails to order class relief is "itself being the instrument of racial discrimination"); *Rosen v. Public Service Electric & Gas Co.*, 409 F.2d 775, 781 (3rd Cir. 1969) (Courts have the duty to assure that when "formal proceedings have ended the ugly face of bias does not reappear"). These courts have recognized that the problems of racial and other forms of employment discrimination are so deeply rooted that unless the federal courts meet their responsibilities, the Congressional intent to end employment discrimination will not be realized.

Moreover, especially with respect to the question of whether the federal courts will delegate this responsibility to an arbitrator selected by the very parties who are charged with discrimination, two courts of appeals have emphatically rejected such an abdication. As the Fifth Circuit stated in *Hutchings v. U.S. Industries:*

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[4]The EEOC is empowered under Section 706(f)(1) (42 U.S.C. §2000e-5(f)(1) to bring suit within thirty days after a charge is filed with it. Although section 706 does provide for the filing of charges by commissioners of the EEOC, this is a relatively rare occurrence and the overwhelming majority of cases are initiated by a charge filed by a private party.

"the trial judge in a Title VII case bears a special responsibility in the public interest to resolve the employment disputes, for once the judicial machinery has been set in train, the proceeding takes on a public character in which remedies are devised to vindicate the policies of the Act, not merely to afford private relief to the employee . . . Congress . . . has made the federal judiciary, not the EEOC or the private arbitrator, the *final* arbiter of an individual's Title VII grievance." 428 F.2d at 311, 313-314).

And as the Seventh Circuit stated in *Bowe v. Colgate:*

"the trial court bears a special responsibility in the public interest to resolve the dispute by determining the facts regardless of the position of the individual plaintiff.' 416 F.2d at 715.

2. *The Federal Court Action is De Novo*

Congress has made clear its intent that the federal courts resolve *de novo* all issues of racial discrimination which are properly before them. Thus, under Title VII findings by either State and local agencies or by the EEOC cannot preclude federal court hearings on the merits of claims of employment discrimination.

Under Title VII, as amended, in states where there are state and local agencies to deal with charges of employment discrimination, a charging party must first file charges with the appropriate state or local agency. Section 706(c) (42 U.S.C. §2000e-5(c).[5] Prior to the 1972 amendments, the courts had no difficulty holding that findings of a state agency or even a settlement

[5]The provisions which are now contained in Section 706(c) are substantially identical to those contained in Section 706(b) under the 1964 Act.

arranged by a state agency did not preclude the federal courts from hearing the identical charges. See *I.B.E.W., Local 5 v. EEOC*, 395 F.2d 248, 250 n. 3 (3rd Cir. 1968), *cert denied* 393 U.S. 1021 (1969) (State no cause decision does not prevent pursuit of Title VII remedies); *Voustis v. Union Carbide Corp.*, 452 F.2d 889 (2d Cir. 1971) (settlement does not bar federal suit); *Cooper v. Phillip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972) (Final order in state proceedings does not bar Title VII action).

In passing the Equal Employment Opportunity Act of 1972, Congress dealt directly with the question of whether or not the findings of state or local agencies would bind the EEOC or the courts. Congress specifically refused to preclude either the EEOC or the federal courts from hearing claims adjudicated by state or local employment discrimination agencies. Congress required only that "in determining whether reasonable cause exists, the *Commission* shall accord substantial weight to final findings and orders made by State of local authorities." Section 706(b) (42 U.S.C. §2000e-5(b)) (Emphasis added). Since, as we will discuss below, the finding of reasonable cause is not binding on the federal courts at all, Congress rejected putting any restriction on the federal courts even in circumstances in which state or local authorities had made "final findings and orders."

Nor has Congress allowed EEOC itself to restrict the federal courts' authority and responsibility to adjudicate and end employment discrimination. Prior to the passage of 1972 amendments, the courts had held that a finding of no reasonable cause by the Commission did not preclude a private right of action in federal court on that charge. *Fekete v. U.S. Steel Corp.*, 424 F.2d 331 (3rd Cir. 1970); *Flowers v. Local No. 6 Laborers Int'l Union of America*, 431 F.2d 205 (7th Cir. 1970); *Beverly v. Lone Star Lead Constr. Co.*, 437 F.2d 1136 (5th Cir. 1971);

Robinson v. Lorillard, 444 F.2d 791 (4th Cir. 1971). As the court in *Beverly v. Lone Star Lead Constr. Co.* put it:

> "The Commission is neither required nor physically able to conduct an 'in depth' investigation in every case. . . . The Commission possesses no power of enforcement, it cannot fix a penalty, issue a citation, or grant a cease and desist order. . . . [T]he courts afford the only effective remedy under the present state of the law. Lawsuits and disputes are for the courts. We will not permit the single finding of this investigative agency to stand as a complete defense which precludes all hope of adversary adjudication or remedial action." 437 F.2d at 1141

The 1972 amendments give specific Congressional sanction to this interpretation. Under the Act as amended:

> "If a charge filed with the Commission . . . is dismissed . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such a notice a civil action may be brought against the respondent named in the charge." Section 706(f)(1) (42 U.S.C. §2000e-5(f)(1)).

Thus, Congress specifically refused to make a determination by the EEOC binding on the federal courts.

The refusal of Congress to give binding effect to determinations of either state agencies or the EEOC are evidence of the strong concern which Congress has for the elimination of employment discrimination and the intent of Congress that the federal courts be the final arbiter of claims arising under Title VII. This policy is so strong and the problem so difficult to eradicate that Congress has employed a variety of overlapping and parallel remedies and has repeatedly refused to allow resort to any of these remedies to preclude use of the others. See generally, S. Hebert and C. Reischel, *Title VII*

and Multiple Approaches to Eliminating Employment Discrimination, 46 N.Y.U. L. Rev. 449 (1971).

The remedies created by Congress, the Courts and the Executive are as follows: The statutory remedies for employment discrimination include the Civil Rights Act of 1866 (42 U.S.C. §1981); the Civil Rights Act of 1971 (42 U.S.C. §1983–which applies to employment discrimination involving state action); a private action under Section 706 of Title VII; an enforcement action by the Equal Employment Opportunity Commission under Section 706 of Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972; and a pattern and practice suit under Title VII. The President has issued a series of executive orders dating back to 1941 forbidding racial discrimination by government contractors. The latest major revision of these executive orders, E.O. 11246, created an Office of Federal Contract Compliance (OFCC) which administers a broad-ranging system to regulate the employment practices of employers with whom the government contracts. Moreover, certain regulatory agencies have recognized their responsibility not to sanction or support racial discrimination in the industries. See e.g., In the Matter of In Re Petitions filed by EEOC, FCC. Docket No. 19143 (Proceedings against AT&T). Moreover, under the Labor Act additional remedies for racial discrimination are available. See *Steele v. Louisville and Nashville Railway*, 323 U.S. 192 (1944) (duty of fair representation); *United Packinghouse Workers v. N.L.R.B.*, 416 F.2d 1126 (D.C. Cir., 1969) (unfair labor practice charge). There have been numerous holdings that the remedies are supplemental to each other and do not have preclusive effect on the others. See, *United Papermakers Local 189 v. United States*, 416 F.2d 980 (ruling by OFCC that affirmative action plan was appropriate would

not bar pattern and practice action by the government under Title VII); *Williamson v. Bethlehem Steel Company*, 468 F.2d 1201 (2d Cir. 1972), *cert. denied* (April 16, 1973) (suit by the attorney general does not bar private cause of action); *U.S. v. Operating Engineers Local 3*, ___ F. Supp. ___, 4 FEP Cases 1088 (N.D. Calif. 1972) (settlement agreement by U.S. in pattern and practice suit under Title VII does not bar private right of action under Title VII); *Tipler v. E.I. Dupont*, 443 F.2d 125 (6th Cir. 1971) (adverse determination by NLRB of unfair labor practice charge does not bar Title VII action).

In passing both Title VII of the Civil Rights Act of 1964 and the amendments to it embodied in the Equal Employment Act of 1972, Congress was not only aware that there were overlapping remedies for remedying employment discrimination, it specifically sanctioned their use and refused to make any remedy the exclusive method of enforcing this national policy. Thus, in the debates concerning the passage of Title VII, 1964, Senator Clark specifically stated that:

> "Title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other federal and state statutes. If a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction." 110 Cong. Rec. 7207 (1964).

And the Senate rejected a proposal which would have made Title VII the exclusive means of relief in employment discrimination cases. 110 Cong. Rec. 13650-13652 (1964).

In passing the 1972 amendments, Congress gave these problems close and careful attention and Congress again refused to back away from its strong position in favor of multiple remedies for employment discrimination. First,

although the 1972 amendments granted to the EEOC the right to bring an enforcement suit in the federal courts, the private right of action was preserved. Section 706(f), 86 Stat. 105-106 (1972). A private party may bring suit if the Commission dismisses his charge[6] or enters into a conciliation agreement unacceptable to him, or if the Commission does not act upon his charge expeditiously.[7] The private action was preserved to ensure that individuals could resort to the courts where the Commission concluded that there were insufficient grounds to warrant suit by the government, or where Commission action had produced unsatisfactory results. 118 Cong. Rec. S. 3462 (March 6, 1972); 118 Cong. Rec. H. 1862-1863 (1972) (Section-by-Section Analysis submitted by conference managers of the bill.) Thus, under the 1972 amendments, as in 1964, Congress recognized that "an individual's right to relief are paramount under Title VII"[8] and provided resort to the courts in order to guarantee them.

The holding of the court of appeals that decisions in the arbital forum preclude all resort to the courts is therefore clearly inconsistent with the statutory scheme of preserving the paramount role the federal courts in enforcing nondiscrimination in employment. "Confidence to the extent that Congress was willing to

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[6]Compare *General Drivers, Chauffeurs and Helpers, Local 886 v. NLRB*, 179 F.2d 492 (C.A. 10) (Refusal of General Counsel of N.L.R.B. to initiate suit not reviewable.)

[7]Section 706(f)(1) provides in pertinent part:

"If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party . . . a civil action may be brought . . . by the person claiming to be aggrieved . . . ."

[8]Section-by-Section Analysis, id.

dispense it, reposes finally with the Federal Courts." *Hutchings v. U.S. Industries, supra,* 428 F.2d at 311.

Second, there was a specific attempt to make Title VII the exclusive remedy for unlawful employment practices. Congressman Erlenborn apparently considered pre-emption of other remedies by Title VII a major aspect of his bill. In an explanation of H.R. 9247 (passed by the House as H.R. 1746) he stated:

> Section 3(b) of the bill adds a provision that charges filed under Title VII shall be the exclusive federal remedy for persons claiming to be aggrieved by discriminatory practicus (sic) of covered respondents... One effect of this section is to supercede employment discrimination proceedings now being filed under the Civil Rights Act of 1866 and the National Labor Relations Act, amongst others.
>
> H.R. 9247, 92nd Congress
> 1st Session (1971)

Nonetheless, Congress refused to do so and the Senate Committee made it clear that neither the "provisions regarding the individual's right to sue under Title VII nor any of the provisions of this bill are meant to affect existing rights granted under other laws." Senate Report No. 415 at 24. See generally, G. Sape and T. Hart, *Title VII Reconsidered–the Equal Employment Act of 1972,* 40 G.W.U. Law Rev. 824, 884-888 (1972).

Third, an attempt was made to consolidate the Office of Federal Contract Compliance with the EEOC. This provision passed the Senate but was deleted in the conference and the independent status of the OFCC as an arm of the Department of Labor was preserved. Fourth, even though the EEOC was given enforcement powers under Section 706, and the authority to bring pattern and practice suits under Section 707 previously vested in

the Department of Justice was transferred to the EEOC, the power was given to the Attorney General to bring pattern and practice suits against state and local governments.

These decisions by the Congress are clear evidence that the Congress weighs the national policy against discrimination much more heavily than any need to consolidate the various remedies in any single place. The policy against employment discrimination far exceeds any considerations of administrative efficiency.

The role of arbitrators and arbitration awards is given no specific mention in Title VII. This is in sharp contrast to the role of EEOC and the state and local agencies—agencies with specific expertise in the areas of employment discrimination—which have been given a very limited role in adjudicating charges of employment discrimination. Moreover, where Congress has intended to confer a special status on arbitrators, it has done so specifically. See NLRA §203(d), 29 U.S.C. 173(d).[9] It is simply not credible to suggest that Congress intended to confer on an arbitrator, who is given no special status under Title VII, power to oust the federal courts from hearing a claim of employment discrimination when this power has been denied the administrative agencies with direct responsibility for, and expertise in, handling these charges.

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[9] See discussion of the status of arbitration under the Labor Act, pp. 24 to 27, *infra*.

B. The Purposes of Arbitration and Title VII Differ

1. *Enforcement of the National Policy Against Employment Discrimination Cannot Be Entrusted to the Grievance-Arbitration Process*

Even if Congress had not so clearly manifested its intent to place ultimate responsibility on the federal courts to adjudicate claims of employment discrimination, an analysis of the purpose, function and practice of the grievance-arbitration process makes it clear that this mechanism cannot be trusted, absent judicial review, to effectuate the policies embodied in Title VII.

The arbitration process receives specific sanction under the National Labor Relations Act (NLRA). The purpose of the Act is to promote industrial harmony by setting and enforcing fair rules for the interaction among the employers, unions and employees, by promoting the collective bargaining process as the principal means for the resolution of disputes between labor and management and by regulating the economic self-help activities of the parties to such disputes when the collective bargaining process fails to do so. The Act recognizes the rights of employees to join together to protect their collective interests; it seeks to safeguard this right, but is essentially not concerned with the ultimate resolution of a labor-management dispute, so long as the processes for arriving at the resolution are fair and regular and the waste, disruption and violence engendered by strikes and other means of economic warfare are avoided.

Arbitration is a process designed to channel disputes arising during the life of an agreement into a dispute resolution machinery which was created by collective bargaining to reinforce the bargaining powers. *Republic Steel v. Maddox*, 379 U.S. 650 (1965). As such, the

arbitration process receives specific sanction under the Labor Act as an effective tool for executing that Act's overall purpose of industrial harmony. See NLRA §203(d), 42 U.S.C. §173(d). Over the years, labor and management have both recognized the effectiveness of the grievance arbitration process as a tool for resolving their disputes. The Union gets for its membership a fast, relatively informal and inexpensive method of resolving grievances of individual members or groups of members. The employer obtains as a *quid pro quo* for the use of this mechanism an agreement from the union not to strike over issues which may be subjected to this process. See *Boys Market, Inc. v. Retail Clerk's Union, Local 770,* 398 U.S. 235 (1970); *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195 (1962); *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957). All parties presumably benefit from the avoidance of any strikes over such issues.

The process is, of course, limited by its own purposes. Arbitration is a creature of the collective bargaining agreement which creates it and accordingly must conform to the expectations of the parties who entered into the collective bargaining agreement. *United Steelworkers of America v. Enterprise Wheel and Car Corp.,* 363 U.S. 593, 597 (1960). Moreover, since the contractual rights of the individual are created by the collective bargaining process, the Act contemplates that the union may, in good faith, lawfully sacrifice the rights of the individual in the best interest of the majority. *Vaca v. Sipes,* 386 U.S. 171 (1967); *U.S. Bulk Carriers, Inc. v. Arguelles,* 400 U.S. 351, 361 (1971) (Harlan, J. Concurring). *Humphrey v. Moore,* 375 U.S. 335 (1964).

As we have discussed above, the basic purpose of Title VII is to end employment discrimination based upon race, national origin, sex or religion. Thus, Congress in passing Title VII did not create a neutral umpire, like the

NLRB, to call balls and strikes in the game between labor and management. Nor did it seek to promote harmony or nurture the collective interests of the majority at the possible sacrifice of minority rights. To the contrary, the emphasis on Title VII is to disrupt the *status quo* of discrimination which Congress found to exist when it passed both the original Act of 1964 and the 1972 amendments;[10] it sought to protect individuals and minority groups from the deplorable conditions of discrimination under which they were and still are forced to work and to provide effective remedies for these conditions. As the court stated in *Culpepper v. Reynolds Metals:*

> "Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination." 421 F.2d at 891.

Given the contrasting and conflicting purposes of arbitration under the NLRA and the private right of action under Title VII, one would expect that the arbitration process would receive greater deference from the NLRB than it would from the federal courts under Title VII. The decision of the courts below, however, gives to the arbitration process a status which the NLRB

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[10]This has led to reshaping of the standards by which the legality of conduct is judged. Thus, conduct which was lawful under the Labor Act became unlawful under Title VII. Compare *Whitfield Local 2708 v. United Steelworkers*, 263 F.2d 546 (5th Cir.) *cert denied* 360 U.S. 902 (1959) (Collective bargaining agreement lawful under Labor Act) with *Taylor Armco Steel Corp.*, 429 F.2d 448 (5th Cir. 1970) (identical agreement unlawful under Title VII); and compare *Howard v. St. Louis, S.F. Ry.*, 361 F.2d 905 (8th Cir. 1966) (Railway Labor Act) with *Norman v. Missouri Pac. RR*, 414 F.2d 73 (8th Cir. 1969) (Title VII).

has specifically denied to it under the NLRA. As a matter of both law and practice, the Labor Board has refused to preclude itself from inquiring into the merits of an unfair practice charge whose subject matter has been heard before an arbitrator. *Lodge No. 12 v. Cameron Iron Works*, 257 F.2d 457 (5th Cir. 1958); *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955); see generally, Note, the *NLRB and Deference to Arbitration*, 77 Yale L.J. 1191 (1968).

We submit that at the very least under Title VII, the federal courts must take their responsibility to end employment discrimination as seriously as the Labor Board takes it responsibility to execute national labor policy. Indeed, we shall show below that the federal courts must be even more rigorous than the Labor Board in protecting individual and minority group rights.

2. *The Grievance Arbitration Process Is Not a Reliable Mechanism for Adjudicating Claims of Employment Discrimination.*

Given the purposes and functions of the arbitration process, it is not surprising that this process does not have the characteristics which make it a desirable method to resolve claims of racial and other forms of employment discrimination. In the first place, the process is written, designed and controlled by the employer and the union. Since both the employer and the union are subject to charges of discrimination under Title VII, they have a built-in conflict of interest between their collective interests and that of individuals or minority groups charging discrimination. See W. Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. Pa. L. Rev. 40, 46, 49 (1968) (employers and union "view minority members as a disruptive intrusion into what

otherwise might be a smooth-working bilateral agreement").[11] The conflict is especially serious with respect to the unions because in most cases the union has virtually total control not only over whether a particular grievance goes to arbitration, but also over the vigor with which any given grievance is pressed before the arbitrator. *Vaca v. Sipes, supra* (only duty imposed on union is not to act arbitrarily or in bad faith).

As more and more cases are decided under Title VII, it is becoming increasingly clear that collective bargaining agreements are the embodiment of discrimination against the classes of people protected by Title VII. See e.g., *Quarles v. Phillip Morris Co.*, 279 F. Supp. 505 (E.D. Va. 1968) (Collective bargaining agreement froze blacks in discriminatory conditions); *Robinson v. Lorillard Corp., supra* (union pressure forced discriminatory seniority provisions in agreement); *U.S. v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971) (collective bargaining agreements dating back to World War I discriminated against blacks); *U.S. v. United Papermakers, Local 189*, 416 F.2d 980 (5th Cir. 1969) (collective bargaining agreement perpetuated past discrimination).

It is simply not realistic to expect that there will be a reliable remedy for this very discrimination in the agreement which sanctions it. Nor is it realistic to expect

[11]For a particularly egregious example of the use of the arbitration process by employer and union, see *Hotel Employers Ass'n*, 47 L.A. 873 (1966) (Burns, Arbitrator) and analysis thereof by A. Blumrosen, *supra*, 24 Arb. J. at 95-99. In that case, the employer, under pressure from a coalition of civil rights groups, agreed to hiring goals as a remedy for past discrimination. The union grieved this agreement and a panel of arbitrators selected by the union and the employer ruled the agreement to violate federal law as well as the collective bargaining agreement. The civil rights groups were not allowed to participate in the selection of the arbitrators or the hearing.

that unions which are aware of their potential liability as defendants in Title VII actions will process grievances charging employment discrimination without regard to the collective interests of the union majority.

The infirmity of conflict of interest which permeates the arbitration process as a whole in these cases in transmitted directly to the arbitrator, since he is selected by the parties with the conflict. As one noted commentator put it:

> "[T]here is some basis for the fear that economic self-interest and the desire to be loved, which are linked with future acceptability, may distort adjudication even where there is complete harmony between the individual's interests and those of his representatives." Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. Chi. Rev. 30, 44 (1971).

Nor is conflict of interest the only problem in entrusting to an arbitrator effectuation of the national policy against racial and other forms of employment discrimination. As this Court has stated it:

> "An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not set to dispense his own brand of industrial justice. He may, of course, look to guidance from many sources, but his award is legitimate only so long as it draws its essence from the collective bargaining agreement . . . . [an award] based solely on the arbitrators view of the requirements of enacted legislation would mean that he exceeded the scope of his submission." *United Steelworkers v. Enterprise Wheel and Car Company, supra*, at 597.

Thus, the arbitration process precludes the arbitrator from ruling that discriminatory provisions of the collective bargaining agreement are unlawful. The decisions of the courts below would oust the federal courts from hearing a claim of racial discrimination which the arbitrator had no authority to decide. See e.g. *United Airlines Inc.*, 48 L.A. 727, 733 (Kahn, Arbitrator) ("jurisdiction . . . does not extend to interpreting and applying the Civil Rights Act; decision upheld "no marriage" rule for stewardesses held to be unlawful in *Sprogis v. United Airlines*, 444 F.2d 1194 (7th Cir. 1971) *cert. denied* 404 U.S. 991 (1971)).

As a corollary to this lack of authority, arbitrators lack the expertise to decide questions of discrimination under Title VII. They are selected for their expertise in the industry and for their knowledge of the collective bargaining agreement, but are neither expected to, nor do they, as a matter of practice, base their decisions on the laws against employment discrimination. See e.g. *The Ingraham Co.*, 48 L.A. 884 (Yagoda, Arbitrator) ("We are not the Equal Employment Opportunity Commission and should not put ourselves in its place in terms of our rights or ability to enforce the law which they administer"); *Pitman-Moore Div.*, 49 L.A. 709, 718 (Seinsheimer, Arbitrator) ("it is not up to the Arbitrator to interpret federal law. My responsibility has only to do with determining if the Company has violated the Contract").

The limited authority of the arbitrator presents a number of insurmountable deficiencies in the arbital process which preclude substantial reliance on it as a basis for ending employment discrimination. Because the arbitrator is limited to resolution of the specific grievance of the individual, he cannot deal with the class problems inherent in any charge of race, national origin, sex or

religious discrimination. The courts have long recognized that such discrimination is discrimination against the class by its very nature. *Hall v. Werthan Bag*, 251 F. Supp. 184 (D. Tenn. 1966); *Jenkins v. United Gas, supra.* And because of this have allowed individual employees to challenge across-the-board practices of discrimination. See e.g. *Johnson v. Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969); *Mack v. General Electric Company*, 329 F. Supp. 72 (E.D. Pa. 1971). If authority were to be reposed in the arbitrator to resolve the specific claims of individuals and that decision were a bar to further proceedings in the federal courts, the purposes of Title VII to end discrimination would be severely hampered.

Closely related to the problem of the arbitrator's limited authority to deal with the class problem is his circumscribed authority to grant adequate remedies. Experience thus far under Title VII has provided a number of examples of cases in which the remedy was a total modification of the provisions of the collective bargaining agreement. See e.g. *Long v. Georgia Kraft Co.*, 450 F.2d 557 (5th Cir. 1971) (parties to collective bargaining agreement unable to work out remedy); *United States v. Bethlehem Steel Corp.*, 446 F.2d 452 (2d Cir. 1971) (transfer and seniority provisions revised); *EEOC v. Plumbers Local 189*, ___ F. Supp. ___, 5 FEP Cases 133 (S.D. Ohio 1972) (referral provisions of collective bargaining agreement totally revised); *United States v. Sheetmetal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969) (referral provisions revised). An arbitrator simply cannot order this kind of relief. Precluding a victim of discrimination who grieved any of the discriminatory practices found in these cases from federal court suit would deny him any hope of obtaining a remedy.

As the court pointed out in *Jenkins v. United Gas, supra*, every Title VII claim embodies issues specific to the claimant and issues which relate to the class which the private litigant serves as a "private attorney general". It is not hard to imagine that an individual may need the quick, inexpensive relief available to him under a collective bargaining agreement while entertaining a long-range intent to end the practice complained of as it effects his class. The courts below would cut off the right of the employee to be a class representative as the price for seeking speedy relief under a contract. For, win or lose, the right of federal action is forfeited if the case is arbitrated. How little sense this makes in light of the observations of the court in *Jenkins* that it is the duty of the courts to cure not only the specific ill complained of by the victim of discrimination, but to end the practice that was the swampy source of the malaise.

The practical necessity of keeping the arbitration process fast and inexpensive exacerbates problems created by the limited scope of the arbitration process. For example, there is usually no provision for discovery by representative of the grievant in presenting his case to the arbitrator. See R. Smith, L. Merrifield and D. Rothschild, *Collective Bargaining and Labor Arbitration*, 217-218 (1970). Although the union may investigate, there is no requirement that it conduct a broad ranging investigation into related practices. And thus, the safeguards of EEOC investigation which protects the layman who may not accurately draft or understand the nature of the discrimination practices against him are not available in the arbitration process. Even where the union is acting in total good faith, its lack of expertise in the area of employment discrimination and its lack of resources to discover and investigate evidence may severely hamstring its efforts to present a grievant's case

to the arbitrator. To allow a process with such infirmities to bar the federal courts from hearing the claims would defeat the underlying purposes of Title VII by making it much more difficult to deal effectively with practices of discrimination.

Finally, it should be noted that other aspects of the arbitration process created by the need for an inexpensive remedy also make the decision of the arbitrator inherently inadequate as a substitute for a federal court hearing. These include the fact that generally the grievant is not represented by counsel, that the rules of evidence need not apply, that witnesses need not be sworn,[12] that cross examination is not necessarily used,[13] and that careful fact finding is not necessarily required.[14] We submit that the shortcuts necessitated by the purpose of the arbitration process render it an inappropriate mechanism for deciding important, complex questions involved in employment discrimination cases.

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[12]See Elkouri & Elkouri, *How Arbitration Works*, 155-156 (1960).

[13]See R. Fleming, *The Labor Arbitration Process*, Ch. 7 (1965).

[14]*United Steelworkers v. Enterprise Wheel and Car Corp., supra*, 363 U.S. at 598 ("Arbitrators have no duty to the court to give their reasons for an award").

II.

THE NATIONAL POLICY AGAINST RACIAL DISCRIMINATION IN EMPLOYMENT AND THE NATIONAL LABOR POLICY CAN BEST BE SERVED BY GIVING AN ARBITAL AWARD ONLY SUCH EVIDENTIARY WEIGHT AS IT DESERVES.

From what has been discussed thus far, it is clear that a rule which would preclude the federal courts from hearing charges of racial discrimination which are based on claims which were the subject of a grievance and an arbitration award should be rejected. Deciding that a preclusion rule is inappropriate, however, does not resolve the issue raised in the instant case since the courts below on remand would still have to decide whether they should defer to the arbitrator's award in the circumstances of this case. Nor does it resolve the conflict in the circuits over the appropriate standards to be applied in deciding whether an arbital award should have any effect on a federal court suit under Title VII. We submit that it is both necessary and desirable for the Court to set out standards in this confused area in order to give guidance not only to the courts below on remand, but all of the lower federal courts which have wrestled with the question raised here.

We submit that the considerations which make an automatic preclusion rule improper also make a rule giving even conditional preclusive effect to arbitration awards unwise. Moreover, we believe that the best way to accommodate national labor policy and national employment discrimination policy is to prevent the use of any of these remedies from barring pursuit of any other.

As we have indicated above, in cases where the subject matter of an unfair labor practice charge has been brought before the arbitrator prior to charges being filed

with the NLRB, the Labor Board does not automatically defer to the decision of the arbitrator. *Lodge No. 12 v. Cameron Iron Works, supra.* Rather, the Board determines whether "the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of this Act"; only if all these conditions are met will the labor board defer to an arbital award. *Spielberg v. Manufacturing Company, supra,* 112 NLRB at 1082.

Two courts of appeals have dealt directly with the question of whether the approach used by the Labor Board in deciding an arbitrator's award can best be adapted to the special problems of enforcement of Title VII rights. In *Bowe v. Colgate,* 416 F.2d 711 (7th Cir. 1969), the Seventh Circuit cited *Spielberg* for the proposition that the arbital award does not deprive the federal courts of power to hear actions under Title VII; the court held that aggrieved employees can "utilize dual or parallel prosecution both in court and through arbitration so long as election of remedy was made after adjudication so as to preclude duplicate relief which would result in unjust enrichment." 416 F.2d at 715.

The Court of Appeals for the Fifth Circuit has also held that an arbital award does not preclude federal court suit, but that the courts in Title VII cases should defer to arbitrator awards only when the following criteria are met:

> "First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with the rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court

must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbital hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities." 467 F.2d at 58.

We submit that the approach of the Seventh Circuit in *Bowe* best effectuates the policies of Title VII while not unduly interfering with national labor policies. The valid considerations set out by the Court in *Rios* should go to the weight of the arbitrator's award as evidence.

The *Bowe* approach guarantees that the federal courts will continue to carry out the responsibilities placed on them by Congress to effectuate the national policy against racial and other prohibited forms of discrimination in employment. It assures that the federal district judge before whom a complaint of racial discrimination properly comes will meet this responsibility with a determination on the merits of the claim and not abdicate his responsibility to an arbitrator selected by parties who may be charged with discriminating. Thus, it is clear that as far as the effectuating, the policies embodied in Title VII are concerned, the *Bowe* rule is best. If some other approach is to be used, it must be because some other considerations outside of Title VII's strong policy against employment discrimination outweighs this public interest.

A priori, a judgment by the courts that other policies outweigh the public interest in ending employment discrimination is highly suspect since this Court has stated that the national policy against racial dis-

crimination is "of the highest priority". *Newman v. Piggie Park Enterprise,* 390 U.S. 400, 88 S.Ct. 964 (1968). The arguments in favor of limited deferral are so insubstantial, however, that they would not outweigh even lesser governmental interests.

The three courts of appeals which have indicated that deferral to the decision of an arbitrator would be proper in any circumstances, have between them, advanced only two reasons for such deferral. The opinion in *Rios v. Reynolds Metals Co.,* 467 F.2d 54 (5th Cir. 1972) summarizes them as follows:

> In some instances such a requirement would not comport with elementary notions of equity, for it would give the employee, but not the employer, a second chance to have the same issue resolved. More importantly, such a requirement would tend to frustrate the national policy favoring arbitration. An employer would have little incentive to agree to arbitrate under a system where only the employee, in the event of an adverse arbital determination, would have an opportunity to relitigate the matter in court.

See also *Dewey v. Reynolds Metals, supra* (If "employer but not the employee is bound by arbitration [t]his result could sound the death knell to arbitration of labor disputes"); *Alexander v. Gardner-Denver Co.* (App. 42) ("We cannot accept a philosophy which gives the employee two strings to his bow when the employer has only one.") None of these arguments withstand critical analysis.

The argument that it would be unfair to the employer to allow an employee a second chance is directly contrary to the whole body of case law which has sanctioned multiple remedies for employment discrimination in order to effectuate the strong national policy against such

discrimination. See Section I.A.2, *supra*. The courts below were concerned that allowing an employee to pursue both his contractual and statutory rights would somehow give that employee an unfair advantage over his employer. This is simply absurd. The employer has control over the employee's economic welfare and ability to earn a living; the employer has economic resources which the employee can only dream about; he can hire and pay for legal defense for his actions and he can delay legal proceedings for so long that any ultimate relief obtained by an employee in court may arrive long after it can do the employee any good. For these reasons it makes no sense to talk about an employee having the advantage of "one and a half" or "two strings to his bow"; the employer has armored columns and nuclear weapons. We submit that the more proper interpretation of the conflict between an employee and an employer over employment discrimination is that of the Fifth Circuit which has characterized it as a "David and Goliath confrontation". *Sanchez v. Standard Brands,* 431 F.2d 455, 464 (5th Cir. 1970) ("In such a confrontation, surely Goliath should not be allowed to fell David with the help of a club fashioned from forms and legal technicalities. The most elementary principles of justice require us to remove this club and compel a battle on the *merits* of the controversy.")

The second argument advanced in favor of deferral is that making the arbitration award binding on the employer but not on the employee will "sound the death knell" of arbitration by removing the employer's incentive to enter into collective bargaining agreements with arbitration clauses in them. This argument is wholly specious. The fact of the matter is that the employer enters into agreements with arbitration clauses in them in

order to obtain a no strike clause; it is the incentive to avoid costly and disruptive strikes and not the outcome of any particular arbitration case which motivates the employer to bind himself to arbitration. See, *Boys Market Inc. v. Retail Clerks Union Local 770, supra; Sinclair Refining Co. v. Atkinson, supra; Textile Workers Union v. Lincoln Mills, supra.* The performance of employers in the past gives ample assurance that no serious impact on the employers desires to enter into arbitration clauses would result from that policy of no deference to the decisions of arbitrators. For example, the decision in *Sinclair Refining Company v. Atkinson, supra,* called into question whether an arbitration clause could be enforced as the *quid pro quo* for a no strike clause; indeed the dissent stated that "the decision delivers a crippling blow to the cause of grievance arbitration itself". 370 U.S. at 327. Nonetheless, in a four-year period of time after the decision of *Sinclair* (prior to its reversal in *Boys Market, supra*) 90% of the collective bargaining contracts contained arbitration clauses. Bureau of Labor Statistics, U.S. Department of Labor, *Major Collective Bargaining Agreements–Arbitration Procedures,* Bulletin No. 1425-6 (1966). Similarly, the experience under the NLRA also indicates that the likelihood of subsequent litigation does not deter parties from entering into arbitration clauses. The Labor Board for substantial periods of its recent history has refused to defer to arbital decisions. See Note, *the NLRB and Deference to Arbitration, supra,* 77 Yale L.J. at 1204-1208. From 1960 to 1964, the Labor Board deferred in only 23% of arbitration cases; from 1965 to 1967 it deferred in only 12% of the cases; from 1965 to 1967 it deferred in only 2 cases involving employer or union discrimination. *Ibid.* Nonetheless, a recent representative sampling of collective bargaining agreements

indicated that 94% contained arbitration clauses. Bureau of National Affairs, *Labor Relations Year Book: 1970* 38. These statistics indicate that the arbitration process is a hearty one and that allowing the victims of racial discrimination to pursue statutory remedies is no threat to the process.

To the contrary, we submit that any rule which involves preclusion of the statutory by the remedy by pursuit of a grievance will inevitably result in less reliance on the grievance machinery by the victims of racial discrimination. As the court indicated in *Culpepper v. Reynolds Metals, supra,* this is directly contrary to Title VII's emphasis on voluntary compliance. On the other hand, if the employee can pursue his grievance remedy prior to resorting to Title VII, this will allow the arbitration process to work as a screening device in those cases where the employee is satisfied with the result of the arbitration. It will also encourage employees to use the arbitration process, and therefore strengthen that process.

For the above reasons, we submit that there is no substantial reason for allowing even limited deference to arbital awards. See Meltzer, *supra,* 39 U. Chic. L. Rev. at 45-46. If the Court is to consider allowing such deference at all, we believe it must deal with the inherent inadequacies of the arbital process as a tool for enforcing Title VII's purposes. Primary, among these inadequacies is the fact as discussed above that both the arbitrator and the union often have a conflict of interest with the Title VII grievant. At the very least, if the decision of an arbitrator is in any circumstances to deprive a person alleging to be discriminated against from his day in federal court, he must be allowed a full opportunity to prosecute his own claim in the arbitration hearing and to

have adequate counsel of his own. See Edwards and Kaplan, *Racial Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 651-652 (1971). We doubt, however, that even the full control of the arbitration hearing by the grievant who is represented by counsel would render the process sufficiently reliable for a federal court to defer to the process. Instead, we submit that the criteria suggested in *Rios* should be applied to an arbital award, not for the purposes of whether the case should be heard on its merits, but rather for the purposes of what weight to give the arbital award for evidence. See *Smith v. Universal Services Inc.*, 454 F.2d 154 (5th Cir. 1972) (EEOC investigation and finding of probable cause admissible as evidence of discrimination even though a finding of "no cause" would not bar suit).

III.

DEFERRAL IN THE INSTANT CASE WOULD BE IMPROPER AND UNFAIR.

Applying the principles we have discussed to the facts of the instant case, it is clear that the decisions of the court below to defer to the arbital award should be reversed. Indeed, the instant case provides an excellent example of the dangers and deficiencies of a rule which will allow a federal court to dismiss a claim of racial discrimination on the basis of an arbital award, without ever reaching the merits of that claim.

In the instant case, petitioner attempted to separate out his statutory claim of racial discrimination from his contract grievance of unjust discharge. He did this after he had reached the conclusion that the union was not vigorously processing his grievance. Accordingly, prior to the arbitration hearing, he filed charges of racial dis-

crimination with the Colorado Civil Rights Commission—the first step in perfecting his right to federal court suit. Sixty days later, his charge was filed with the EEOC which had his charge before it for five weeks prior to the arbitrator's decision. At the arbitration hearing, petitioner specifically informed the arbitrator that his charges of racial discrimination were pending before the appropriate administrative agencies. He was not represented by counsel at the hearing, but did inform the arbitrator that he was dissatisfied with the union's representation of him with respect to the issue of racial discrimination. The arbitration decision itself confirmed petitioner's fears with respect to the quality of representation he received from the union since the arbitrator specifically found that on the issue crucial to determination of discrimination—whether it was the company's practice to transfer rather than discharge trainees who were not performing well—that he had "no way of knowing if this had been the practice or not. Certainly this unsupported statement [of the union] falls far short of proving a well-established past practice." (App. 22).

Thus, in the instant case petitioner specifically requested that the issue of racial discrimination not be heard in the arbitration proceeding. He gave as his reasons for not wishing the issue heard that he felt unable to represent himself before the arbitrator, that the union representation of him on this issue was unsatisfactory, and that he had no counsel of his own. He instead indicated that he wished the appropriate administrative agencies to handle these charges. The arbitrator, having been informed of these circumstances refused to decide the issue. He instead indicated his doubts on it and suggested, without deciding, that it might be appropriate to reinstate petitioner in his former job. Under these

circumstances it is manifestly unjust and unfair to bind plaintiff to the nondecision of the arbitrator.

The injustice of binding petitioner in this way is all the worse because the rationale of the courts below in relying on *Dewey v. Reynolds Metals Company, supra,* is that petitioner made an "election of remedies" when he pursued his grievance rights prior to filing charges to perfect his statutory right to be free from racial discrimination. The circumstances of this case make it perfectly clear that petitioner made no election in favor of the grievance machinery at all. Indeed if he made any election, it was to pursue the Title VII remedy in preference to the grievance remedy. Even the Sixth Circuit which enunciated the *Dewey* doctrine of election of remedies only holds that a binding election is made when the arbitrator *decides* the grievance prior to the filing of charges with the appropriate fair employment agencies. See *Spann v. Joanna Western Mills Co., supra; Newman v. AVCO Corp., supra; Thomas v. Philip Carey, supra.* See also, *Tipler v. E.I. du Pont de Nemours and Co., supra.*

If the court were to announce a rule of election of remedies, we submit that such an election could be effective only if it were knowingly made. Cf. *Fay v. Noia,* 372 U.S. 391, 439 (1963). Thus if an election of remedy rule is to be announced it should operate prospectively, since petitioner in this case could not have known what the appropriate action to take was.[15] This is especially

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[15]Whether a waiver is "knowing" or "voluntary" is highly questionable where the person who makes the decision is a layman usually without legal counsel who is likely to be unaware of the consequences of his action. Cf. *Sanchez v. Standard Brands, supra; Antonopolous v. Aerojet-General Corp.*, 295 F. Supp. 1390 (E.D. Calif. 1968).

true, since this court has never ruled on the question of whether the Title VII charging party must exhaust the grievance arbitration machinery prior to filing Title VII charges. See *Dewey v. Reynolds Metals*, 291 F. Supp. 786 (W.D. Mich. 1968):

> "It is understandable that any union member would first proceed to raise any rights he felt were due him under the contract. Proceeding first through arbitration is in accord with federal labor law . . . Plaintiff should not be penalized for first proceeding with his contractual remedies through the arbitration process as preferred and indeed mandated by federal labor law. He should retain his rights to also bring a civil rights action."

CONCLUSION

For the reasons stated above, the decisions of the courts below should be reversed and the cause remanded to the district court for proceedings on the merits of petitioner's claims; the remand should direct the district court to award attorney's fees.[16] Because of the con-

[16]Petitioner is represented by appointed counsel who have borne the burden of prosecuting his claim to this Court. Petitioner has been forced to carry his claim to this Court in order to obtain a hearing on the merits. The issue involved in the instant case is one of great public importance and the resolution of that issue will be of great public benefit; a rule announced by this Court will have as profound effect on the administration of the Title VII remedy as an injunction. For these reasons this Court should remand the present case to the district court with instructions to award petitioner an appropriate counsel fee for all of the services rendered in obtaining him the hearing on the merits. Such an award of attorneys fees to a successful appellant is authorized by Title VII and cases decided under it. Section 706(k) (42 U.S.C. §2000e-5(k); *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968); *Green v. McDonnell Douglas Corp.*, 463 F.2d 337 (8th Cir. 1972); *Malone v.*

fusion in the lower courts over the appropriate standards to apply in evaluating the effect of an arbital award on Title VII claim, the court should announce uniform standards for the lower courts to apply in such cases. We submit that the appropriate rule would be that arbital awards should be given only such evidentiary weight as the trial court deems they are entitled.

Respectfully submitted,

PAUL J. SPIEGELMAN
RUSSELL SPECTER
Specter & Spiegelman
P.O. Box 4887
Washington, D.C.

HENRY V. ELWOOD
Lewis, Jones & Elwood
1839 York Street
Denver, Colorado 80206

Attorneys for Petitioner

North American Rockwell Corp., 457 F.2d 779 (9th Cir. 1972); *Parham v. Southwestern Bell Co.*, 433 F.2d 421, 2 FEP Cases 1017, 1024 (8th Cir. 1970) (Attorney fees awarded even though no injunction entered); and *Fogg v. New England Tel. & Tel. Co.*, ___ F. Supp. ___, 5 FEP Cases 8 (D. N.H. 1972).

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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5847

HARRELL ALEXANDER, SR., *Petitioner*

v.

GARDNER-DENVER COMPANY, *Respondent*
a Delaware corporation

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 466 F.2d 1209 (10th Cir. 1972), and appears at pages 45-47 in the Appendix. The District Court opinion appears in the Appendix at pages 33-43 and is reported in 346 F.Supp. 1012 (D. Colo. 1971).

STATUTORY PROVISIONS INVOLVED

Suit was brought in the District Court under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Subsequent to the ruling of the U. S. District Court in this case, and prior to the ruling by the United States Court of Appeals for the Tenth Circuit, the provisions of the Act were amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 effective March 24, 1972.

JURISDICTION

The opinion and order by the Court of Appeals for the Tenth Circuit was entered on August 11, 1972, affirming, *per curiam*, the District Court's dismissal of Petitioner's claim entered on July 12, 1971. On November 4, 1972, Mr. Justice White signed an order extending the time for filing the petition for certiorari up to and including December 8, 1972. The petition was filed on December 8, 1972 and was granted on February 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1970).

QUESTION PRESENTED

Were the lower courts correct in concluding that when a discharged Black employee

a. voluntarily requests arbitration of his discharge under a collective bargaining agreement which proscribes discharge based on race, and

b. raises the issue of race before the arbitrator, and

c. receives an unfavorable decision and award from the arbitrator,

said employee is bound by the arbitration decision and precluded from maintaining an individual Title VII action?

STATEMENT OF THE CASE

Petitioner, Harrell Alexander, Sr. (hereafter called Alexander) was employed by Respondent Gardner-Denver Company (hereafter called the Company) at Denver, Colorado for approximately three years and four months. He was discharged in September, 1969. Alexander is Negro. At the time of his discharge he was a trainee in the Drill Department.

Prior to his discharge, Alexander had been twice warned that his performance on his machine was unsatisfactory and on the second of those occasions, he was temporarily suspended from work for two days. (App. 19) The third similar occasion resulted in his discharge. (App. 20) On October 1, 1969, Alexander filed a grievance under the collective bargaining agreement alleging "I feel I have been unjustly discharged . . ." (App. 32)

The Union is the United Steelworkers of America, AFL-CIO, Local 3029 (hereafter called the Union). The collective bargaining agreement provides for a four-step grievance procedure prior to binding arbitration. (App. 26-27) The Union processed Alexander's grievance through the four grievance steps and no results favorable to Alexander were obtained. The matter was then referred to Arbitrator Don W. Sears, then Dean of the University of Colorado Law School, (App. 34), a former labor law professor, author, co-author and co-editor of legal texts on labor law, and a member of the Colorado Advisory Commission, U. S. Civil Rights Commission.[1]

The pertinent portions of the grievance and arbitration provisions of the collective bargaining agreement read as follows:

Section 5 (App. 26)

Should differences arise between the Company and the Union as to the meaning and application of the provisions

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1. 1972 *Directory of Law Teachers* 538 (West Publishing Co.); *Directory of Arbitrators, Labor Arbitration Reports*, Index covering volumes 41-50, at 1296 (1969).

of this Agreement, or should any trouble arise in the plant, there shall be no suspension of work, but an earnest effort shall be made by both the Company and the Union to settle such differences promptly . . . .

* * * * *

Step 5 (App. 27)

. . . The decision of the arbitrator shall be final and binding upon the Company, the Union, and any employee or employees involved . . . .

At no point in the grievance procedure or during the arbitration did the Union or Alexander designate which portion or portions of the Union contract were allegedly violated by Alexander's discharge. The two provisions of the Union agreement which would have applicability were:

Article 5, Section 2, (App. 23)

The Company and the Union agree that there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestory . . . .

* * * * *

Article 23, Section 6(a), (App. 28)

No employee will be discharged, suspended or given a written warning notice except for just cause.

Prior to the arbitration hearing, Alexander had written a letter to the Union on October 10, 1969, asserting, in part, that: (App. 30)

I am knowledgeable that in the same plant others have scrapped an equal amount and sometimes in excess, but by all logical reasoning I, Harrell Alexander, have been the target of preferential discriminatory treatment.

The matter was heard by Arbitrator Sears on November 20, 1969. When Alexander testified at the arbitration hearing, he maintained the racial issue. (App. 14) On December 30, 1969, Arbitrator Sears issued a written opinion and award (App. 18-22) finding that ". . . the grievant was discharged for just cause." (App. 22) The arbitrator did not specifically discuss the racial issue in his opinion.

While the grievance was ascending the grievance steps, Alexander filed employment discrimination charges with the Colorado Civil Rights Commission, which Commission later terminated its proceedings. (During the arbitration hearing Alexander mentioned the state charge to the arbitrator.) (App. 14) On November 5, 1969, Alexander filed a discrimination-in-employment charge with the Equal Employment Opportunity Commission (hereafter called the EEOC). On July 25, 1970, the EEOC advised Alexander that it found no probable cause for believing a violation of Title VII existed in his case; the EEOC also advised Alexander he could sue the Company in U. S. District Court. (App. 33) Alexander filed a complaint under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq, alleging he was discriminatorily discharged; the complaint was filed by court appointed counsel. (App. 3-5) The U. S. District Court at Denver, Colorado granted the Company's motion for summary judgment and dismissed the action on July 1, 1971. (App. 33-43) The United States Court of Appeals for the Tenth Circuit affirmed the District Court *per curiam* on August 11, 1972. (App. 45-47) Both lower courts found that the charge of racial discrimination was before the arbitrator, (App. 34, 46), and that the issue could not be relitigated in federal courts.

SUMMARY OF ARGUMENT

The decisions of the courts below finding that Alexander's charge of racial discrimination was before the arbitrator and was rejected by him cannot be overturned unless clearly erroneous. Alexander's deposition wherein he stated his *ex post facto* derogatory conclusions as to treatment his discrimination claim received at the arbitration can be given no weight, and it must be assumed that the lower courts discounted Alexander's retrospection before making their findings.

In the case at bar, two overriding public policy considerations and Congressional mandates are at play, *i.e.*, the necessary endorsement of the labor arbitration process as expressed in Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185(a) and as interpreted by the Court in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) and its progeny, and the concern of Congress that an employee alleging an act of employment discrimination be permitted to vindicate his rights in court. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. The Company herein submits that both interests can be reconciled and that the courts below were correct in precluding a relitigation of Alexander's discrimination charge in a Title VII action because he first voluntarily litigated the question at the arbitration hearing and lost.

Several circuit courts have treated the same question differently, leaving a morass of confusion. Their theories may be summarized as follows:

1. An arbitration of a Title VII claim can have no effect on a subsequent Title VII action.

2. An arbitration award is binding and dispositive of the Title VII action if the Title VII action is filed after the arbitrator's award.

3. District courts may defer to an arbitrator's award if a number of specified conditions are met.

Each of the theories named above contains a fatal flaw. To hold that an arbitrator's award on a discrimination in employment claim can have no impact on a Title VII action is to

undermine the clear mandate of Congress in passing Section 301 of the Labor-Management Relations Act which provides for the enforcement of collective bargaining agreements, and contradicts this Court's long standing endorsement of the labor arbitration process as promulgated in *Lincoln Mills* and its progeny; it would operate to create such a broad exception to the rule of *Lincoln Mills* that the exception would engulf the rule. There are five classes of potential claimants protected under Title VII and conceivably most employees filing grievances would fall under one of those five classes. Additionally, there are approximately 160,000 collective bargaining agreements in the United States covering some 25,000,000 employees and 94% of those agreements contain provisions for binding arbitration; since an overwhelming number of today's collective bargaining agreements contain non-discrimination clauses, it is more than likely that employment discrimination claims will be enmeshed in many, many industrial labor arbitrations, particularly since minority groups today are acutely sensitive to discriminatory employment practices. Thus the impact of such an exception to *Lincoln Mills* would emasculate its holding.

To hold that an arbitration award is binding on a Title VII action only if the Title VII action is filed after the award is rendered, is an arbitrary policy totally lacking logical justification. First, it is apparent that because of the procedural steps required of a complaining employee which operate as conditions precedent to his filing of a Title VII suit, the arbitrator's award would invariably be rendered before a Title VII action is filed. Therefore, the mechanical application of this rule would operate to defeat most, if not all, Title VII actions. Second, to hold that if an employee simultaneously invokes both statutory and contract procedures, he thereby preserves his Title VII action is specious reasoning. When an employee proceeds under both procedures simultaneously, he thereby indicates his awareness of his Title VII statutory remedies and thus evidences his ability to knowingly preserve his Title VII action by *not* submitting the discrimination question to the arbitrator. It follows that if he does continue to press the charge of discrimination in the arbitral forum while his Title VII action is pending, he thereby indicates that he chooses

to cast the fortunes of his discrimination claim upon the arbitral waters. Therefore, the Company views the simultaneous use of both contract and statutory procedures as having a preclusive impact upon the Title VII action, rather than a permissive impact.

While a concept of liberal deferral by the district courts to an arbitrator's award is not repugnant to the Company, the multiple rules for deferral as specified by the Fifth Circuit are totally unacceptable because they amount to a requirement that the arbitration, both substantively and procedurally, duplicate a U.S. District Court trial, and thus require arbitration to be exactly that which it was not intended to be: 1) lengthy, 2) costly, 3) unnecessarily complicated, 4) legalistic. The arbitrator's ability to dispense timely industrial justice is materially hampered.

The Company suggests that this Court adopt a policy of liberal deferral to the arbitrator's award if the following three criteria are met:

1. The charge of discrimination was before the arbitrator.

2. The contract prohibited the form of discrimination charged.

3. The arbitrator had authority to rule on the charge and fashion a remedy.

This Court in the past has recognized that the choice of the arbitral forum may affect the scope of the substantive rights to be vindicated before that forum. *U.S. Bulk Carriers, Inc. v. Arguelles,* 400 U.S. 351 (1970). However, this is not wholly repugnant because the parties themselves have consented to the use of that forum.

The Company submits the premise that a Title VII claimant cannot be *required* by law to submit the statutory charge of discrimination to the arbitration process. However, if the employee voluntarily chooses to submit his discrimination claim to arbitration after his claim has arisen, he must be bound by the arbitrator's award and the deferral criteria specified above would be applied by the District Court in reviewing that award.

The choice of the arbitral forum must be made by the employee after the controversy arises and he is not bound by the Union's agreement to arbitrate such disputes. The key is the consent of the employee. The employee would not be precluded from his Title VII action if he chose to process his claim through the *grievance* steps of the contract; it is only when he submits his discrimination case to an arbitrator that the Company's doctrine would operate. Nor would the Company's doctrine operate to preclude the employee from filing a charge with the EEOC even though he has received an adverse award from the arbitrator. For public policy considerations, the EEOC may choose to file suit itself against the employer representing a class of employees similarly situated and the arbitration could not, of course, operate to deprive the EEOC of that action.

Congress never contemplated a situation wherein an employee voluntarily chose to submit a statutory claim to an arbitrator under a collective bargaining agreement. Congress intended only to give the employee a right to sue in U.S. District Court if he so chose. As possessor of that right, the employee can use it fully by filing both an individual and a class action, use it partially by filing only an individual action, use it not at all, or submit it to another forum.

The 1972 Amendments to the Civil Rights Act which dictated that findings by a State or local civil rights agency should be given "substantial weight" by the EEOC only evidences Congress' fear that the employee might be *required* by a sovereign, a law, or a procedure to accept something less than his day in a U. S. District Court to vindicate a discrimination in employment claim; and Congress did not address itself to, nor did it proscribe, the voluntary selection by the employee of an alternate forum for the airing of the civil rights claim. Since the essence of the relationship between Alexander and the Company herein is consensual, the result of that relationship must be accorded full weight.

ARGUMENT

I.
THE CHARGE OF RACIAL DISCRIMINATION WAS BEFORE THE ARBITRATOR.

Alexander's brief is devoted, in part, to attacking the lower court's findings that the charge of racial discrimination was before the arbitrator.[2] The Company proposes to treat the point as a threshhold obstacle since the balance of the Company's position stated *infra* is predicated on the fact that the charge of racial discrimination in employment was before the Arbitrator. It must be remembered that Alexander's deposition was taken one year[3] subsequent to the arbitration hearing and so the *ex post facto* nature of Alexander's recount and description of what took place at the arbitration must be taken into consideration, especially where Alexander alleges in his deposition that he was not adequately represented by the Union on the racial issue (App. 13-14). On a reading of the entire excerpt of the deposition (App. 11-16) one conclusion is unavoidable, that is, both Alexander and the Union raised the charge of racial discrimination at the hearing,[4] and Alexander's conclusionary criticisms one year later of the adequacy of the hearing on the racial issue are of no value herein.

It must be assumed that both lower courts, on a review of the deposition, rejected Alexander's retrospective conclusions on the adequacy of the hearing on the racial issue, and concluded racial discrimination was charged at the hearing. The District Court opinion stated: (App. 34)

> . . . Alexander's deposition taken in this case acknowledges that this charge [racial discrimination] was before the arbitrator . . . . The present posture of the case, then, is that the Commission [EEOC] did not find probable cause that Plaintiff's charge of discrimination was true, and with

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2. Brief for Petitioner at 41-44.
3. Alexander's deposition was taken on November 27, 1970; this information is not included in the appendix.
4. App. 13-14.

> that same charge of racial discrimination before him, the Dean of the University of Colorado Law School, sitting as an arbitrator found against Plaintiff and found that he was discharged for just cause.

On review, the U. S. Court of Appeals for the Tenth Circuit wrote, "The issue of racially-motivated discriminatory employment practices was presented to the arbitrator and rejected." (App. 46)

Rule 52(a), Federal Rules of Civil Procedure, states that lower court findings of fact shall not be set aside unless clearly erroneous. This Court has had numerous opportunities to interpret that rule and unfailingly has endorsed the spirit of the rule. *See Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 495 (1950), wherein it was stated:

> It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.

We do not suppose that this Court will now embark upon a new policy toward lower court fact findings on the occasion at bar.

II.
THE CONFLICT OF ARBITRATION AND TITLE VII IN EMPLOYMENT DISCRIMINATION CASES.

To crystalize the clash of those vital legal premises which are at loggerheads herein, a brief review of where arbitration stands today, how it got there, and how the Title VII question relates to it is appropriate.

At common law, the courts were historically hostile toward agreements to arbitrate because it was considered to be an ouster of the jurisdiction of the courts.[5] This hostility was abated by Congress in 1925 when it enacted the *United States Arbitration Act*[6] which provided that arbitration agreements shall be valid, irrevocable and enforceable; thereafter the courts viewed the Arbitration Act as evidencing a Congressional policy to favor arbitration, at least commercial arbitration.[7] In the field of industrial labor relations this Court has consistently endorsed the arbitral process in labor disputes.

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5. *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1012 (S. D. N. Y. 1915); Gregory & Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 *U. Chi. L. Rev.*, 233 (1950).

6. 9 U.S.C. §§1-14.

7. The applicability of the United States Arbitration Act to labor disputes has often been queried since the Act excludes contracts of employment from its coverage. By 1956 the first, second and sixth circuits had held that collective bargaining agreements were covered by the Act. *Local 205, United Electrical Workers v. General Electric Co.*, 233 F.2d 85 (1st Cir. 1956), *aff'd on other grounds*, 353 U.S. 547 (1957); *Signal-Stat Corp. v. Local 475, United Electrical Workers*, 235 F.2d 298 (2nd Cir. 1956), *cert. denied*, 354 U.S. 911 (1957); *Hoover Motor Express Co. v. Teamsters Local 327*, 217 F.2d 49 (6th Cir. 1954); and the third, fourth and fifth circuits had held they were excluded. *Tenney Engineering Inc. v. United Electrical Workers, Local 437*, 207 F.2d 450 (3rd Cir. 1953); *United Electrical Workers v. Miller Metal Products, Inc.*, 215 F.2d 221 (4th Cir. 1954); *Lincoln Mills v. Textile Workers Union*, 230 F.2d 81 (5th Cir. 1956), rev'd, 353 U.S. 448 (1957).

The United States Supreme Court had an opportunity to rule on the question in 1957 in *Lincoln Mills, supra*, and *Local 205, supra*. In those cases the court held that Section 301 of the Taft-Hartley Act, 29 U.S.C. §185 was a positive grant of substantive power to the federal

In *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), this Court held that under Section 301(a) of the *Labor-Management Relations Act*,[8] an agreement to arbitrate disputes in a collective bargaining contract should be specifically enforced by the federal courts; the Court recognized the Congressional policy relative to Section 301 that placed sanctions behind agreements to arbitrate labor disputes. The progeny of *Lincoln Mills* grew quickly and consistently. In the *United Steelworkers Trilogy* (1960)[9] this Court again recognized the national policy in favor of labor arbitration, once more endorsed the private settlement machinery, and cautioned the lower courts against usurping the arbitrator's function. In one of those cases, *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), this Court made it clear that labor arbitration must have a higher level of judicial respect than that normally accorded other forms of arbitration.

> In the commercial case, arbitration is the substitute for litigation. Here, arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place

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7. Cont'd.
courts to enforce collective bargaining agreements, and the Court did not rule upon the applicability of the Arbitration Act; however, Mr. Justice Frankfurter's dissent in *Lincoln Mills* stated that the majority opinion implicitly rejected the availability of the Arbitration Act to enforce arbitration clauses in collective bargaining agreements. Subsequently, the circuits found it necessary to continue to wrestle with the problem. *See Local 149, American Federation of Technical Engineers v. General Electric Co.*, 250 F.2d 922 (1st Cir. 1957), *cert denied*, 356 U.S. 938 (1958). For the purposes of the case at bar, the Company will assume the accuracy of Mr. Justice Frankfurter's supposition, especially since the Court has remained silent on the issue in subsequent cases cited elsewhere herein. *See* cases cited note 9, *infra*.

8. 29 U.S.C. § 185(a).

9. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960).

> here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself. 363 U.S. at 578.

This policy of judicial sanction for labor arbitration was applied by this Court in a string of post-trilogy cases[10] and today still remains intact.

The case at bar, however, does not lend itself to an automatic application of the principles of this Court expressed above regarding labor arbitration. The case at bar concerns the exercise by an employee of an explicit right to sue his employer given him by Title VII of the *Civil Rights Act of 1964*, 42 U.S.C. § 2000e et seq.[11] when he feels he has been the victim of racial discrimination at the hands of his employer.

> **Section 703(a)**
> It shall be an unlawful employment practice for an employer, (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
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10. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962), (Strike over arbitrable question merits damages); *Drake Bakeries, Inc. v. Local 50, American Bakery and Confectionary Workers International*, 370 U.S. 254 (1962), (strike damages arbitrable); *General Drivers, Warehousemen and Helpers, Local 89 v. Riss and Co., Inc.*, 372 U.S. 517 (1963), (award of contract "committee" rather than arbitrator is enforceable if it binds both parties); *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964), (dispute is arbitrable even if NLRB may have jurisdiction over the problem); *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), (arbitration clause can be binding on company's successor); *Republic Steel v. Maddox*, 379 U.S. 650 (1965), (employee claiming contract violation must attempt use of grievance procedure before bringing suit); *Boys Markets, Inc. v. Retail Clerks, Local 770*, 398 U.S. 235 (1970), (strike over arbitrable dispute is enjoinable).

11. Amended while this case was on appeal to the U.S. Court of Appeals by the Equal Employment Opportunity Act of 1972, effective March 24, 1972. Pub. L. No. 92-261, 86 Stat. 103 (1972).

Section 706(e)
If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under sub-section (c) . . . the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved . . . .[12]

* * * * *

Section 706(f)
Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title . . . .

Unquestionably Congress intended that the employee have access to the court house for vindication of his Title VII rights, if he so chose.

However, the employee herein, Alexander, invoked the arbitration machinery under the collective bargaining agreement,

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12. This language was changed by the 1972 amendments as follows:
Section 706(f)(1)
. . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . . . Pub.L.No. 92-261, 42 U.S.C.A. §2000e-5 (Supp. 1972).

made the charge of racial discrimination at the arbitration hearing, and processed the dispute to a final arbitrator's award which concluded Alexander was discharged for just cause. It will be recalled, Alexander instituted his statutory procedures shortly prior to the arbitration hearing and filed his Title VII action subsequent to the arbitrator's award.

There is no mention in Title VII of the role that arbitration procedures under collective bargaining agreements are to play in matters involving racial discrimination in employment.[13] This Court therefore must determine legislative intent by the sound application of judicial principles and precedent.[14] If this Court determines that it was not the intent of Congress to undermine the role of labor arbitration, or to carve an exception to the binding impact of arbitration for Title VII cases, then this Court must herein define the rules by which lower courts shall govern themselves in striking a balance between labor arbitration and Title VII, even if it means legislating interstitially.[15] Judge Learned Hand stated:

> "Justice is the tolerable accommodation of the conflicting interests of society."[16]

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13. *See Hutchings v. United States Industries, Inc.*, 428 F.2d 303, 311 (5th Cir. 1970).

14. *Fekete v. U.S. Steel Corp.*, 424 F.2d 331, 334 (3rd Cir. 1970); *Hutchings v. U.S. Industries, Inc., Id.* at 311.

15. "We often must legislate interstitially . . . to fill gaps resulting from legislative oversight. . . ." Mr. Justice Douglas, writing for the majority in *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 354 (1970).

16. The International Dictionary of Thoughts 415 (1969).

III.
AN EMPLOYEE CANNOT BE REQUIRED TO ARBITRATE A STATUTORY CLAIM.

Although not directly involved herein, it is necessary to answer the question of whether or not a Title VII claimant can be required to arbitrate his claim under a collective bargaining agreement which proscribes the same activity that gives rise to the Title VII action. If the arbitrator's award is to be final and binding, as the Company proposes, but the selection of the arbitral forum is mandatory, not optional, then the intent of Congress in explicitly providing the claimant with his day in court would clearly be frustrated. The Company submits that, for reasons expressed below, arbitration cannot be required of the Title VII claimant if he chooses not to process the question through arbitration, but prefers to invoke court action only. We review the relevant cases, not only because some circuit court opinions have cast some doubt on the accuracy of this premise, but because this premise must be firmly established by the Company herein or the Company's argument that Alexander's arbitration award is final and binding must, we think, fail.

As a general rule, an employee claiming a labor contract violation (as distinguished from a statutory violation) must first resort to the grievance machinery of the agreement for his vindication, and not to the courts. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). He may look to the courts for enforcement of his contractual rights if "the union has sole power under the contract to invoke the higher stages of the grievance procedure, *and* if, . . . the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance." *Vaca v. Sipes*, 386 U.S. 171, 185 (1967).

But where an employee is statutorily granted a right to sue his employer on a claim that would also be arbitrable, this Court has not required him to arbitrate prior to filing suit. This was the holding in *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1970), where §596 of the Seamen's Act of 1790, ch. 29, 1 Stat. 133, *as amended*, 46 U.S.C. §596 (1970),

authorized an employee to sue his employer on a wage claim. Similarly, where the Sherman Anti-Trust Act, ch. 647, 26 Stat. 209, *as amended*, 15 U.S.C. §1 et seq (1970), authorized an aggrieved person to sue for another's violation of anti-trust laws, and an agreement to arbitrate such claim is entered into between the parties before a particular controversy arises, the courts will not require the claim to be arbitrated before the statutory court action can be pursued. *American Safety Equipment Corp. v. J. P. McGuire & Co.*, 391 F.2d 821 (2d Cir. 1968).[17]

Each of these statutes, like Title VII, was designed to cure an ill of society prevailing at the time of their passage and to protect a particular class of society from traditional abuses, and each, like Title VII, authorizes court suit for vindication of the rights granted the beneficiaries of those statutes. Questions arose under these statutes concerning the propriety of the judiciary requiring a beneficiary of the statute, who was otherwise bound by an agreement to arbitrate controversies identical to those under the statute, to first arbitrate the dispute.

In *Arguelles, supra*, a seaman brought an action in District Court under the Seamen's Act of 1790 to recover wages allegedly due him. The Act provides a penalty for an employer's failure to make prompt payment of wages without sufficient cause. The seaman was also subject to a collective bargaining

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17. The enforcement of an arbitration clause in the face of a statutory right to sue over the same complaint has also been questioned under the Securities Act of 1933, ch. 38, 48 Stat. 74, *as amended*, 15 U.S.C. §77a et seq (1970), and under the Railway Labor Act, ch. 347, 44 Stat. 577, *as amended*, 45 U.S.C. §151 et seq (1970), however, these cases are inapposite because of the peculiar wording in each statute. The Securities Act, Section 14, 48 Stat. 84, 15 U.S.C. §77n (1970), specifically prohibits a beneficiary of the statute from waiving benefits of the statute, which of course would include the statutory right to sue. *Wilko v. Swan*, 346 U.S. 427 (1953).

The Railway Labor Act, Section 153, ch. 347, 44 Stat. 578, *as amended*, 15 U.S.C. §153 (1970), clearly defines an administrative procedure which must be employed before an employee may exercise his right to sue. *Andrews v. Louisville & Nashville Ry. Co.*, 406 U.S. 320 (1972).

agreement which contained provisions concerning seamen's wages and which also required arbitration of disputed claims not settled through the grievance procedure. The seaman made no attempt to comply with the contract provisions but brought suit under the Seamen's Act instead. This Court held that the seaman was not required to exhaust his contractual remedies before bringing suit. It construed the Seamen's Act and arbitration as providing optional remedies to seamen. Mr. Justice Harlan, concurring, distinguished *Maddox, supra*, on the grounds that Maddox's suit was "simply on the contract" whereas Arguelles' claim was also based on a statutory right. 400 U.S. at 362. The majority opinion in *Arguelles*, did not question the continuing validity of the rules announced in *Maddox* and *Vaca v. Sipes, supra*. In the majority's view, the Court's function is to determine whether Section 301 of the Labor-Management Relations Act (as viewed by the court in *Lincoln Mills*) abrogated the earlier Seamen's Act with respect to seamen's wages; no legislative history in the Labor-Management Relations Act was uncovered which would indicate that arbitration was to assume part or all of the roles served by the federal courts charged with protecting the rights of seamen since 1790 – therefore, the Labor-Management Relations Act was construed as providing only an optional remedy.

In *American Safety Equipment Corp., supra*, the court declined to require a claim under the Sherman Anti-Trust Act to be arbitrated even though that claim could be the subject of a previously agreed-upon binding arbitration agreement. The court's rationale was that the pervasive public interest in enforcement of the anti-trust laws, and the public nature of the claims that arise in such cases, make those matters inappropriate for mandatory arbitration.[18] The court expressly excepted from its opinion the efficacy of an agreement to arbitrate

18. *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968), where in addressing itself to the anti-trust issue and its arbitrability the court stated: "Public interest attaches to the ascertainment of the truth as to this issue. Such issues the parties cannot, by stipulation or otherwise, exclude from the area of judicial scrutiny and determination." 396 F.2d at 716; *accord, Wilko v. Swan, supra*, note 17.

made *after* the controversy had arisen, and as we shall discuss *infra*, this exception is critical to the case at bar.

Less clear are similar cases which have arisen under the Fair Labor Standards Act, ch. 676, 52 Stat. 1060, *as amended*, 29 U.S.C. §201 et seq (1970), and it is those cases that may cast some doubt on the Company's premise. Federal courts of appeal have held that when a claim is made under the Act and the settlement of that claim also falls within the grievance and arbitration provisions of a collective bargaining agreement, the employee must first attempt to arbitrate his claim. The rationale for this rule is that the claim grows out of the employment relationship and will necessarily require the application and interpretation of the collective bargaining agreement which governs the employer-employee relationship.[19] However, the most recent and better reasoned case is that of *Thompson v. Iowa Beef Packers, Inc.*, 185 N.W.2d 738 (1971), *cert. improvidently granted and denied*, 405 U.S. 228 (1972),[20] wherein the Iowa Supreme Court, citing *Arguelles*, held a Fair Labor Standards Act claim cannot be forced to arbitration in preference to the statutory action, and stated at 185 N.W. 2d 742:

> We doubt that the general Congressional intent favoring arbitration can stand against the specific Congressional intent which is manifest in the Fair Labor Standards Act provisions giving employees strong and detailed rights in court. We think Congress intended that workmen should have free access to the court in FLSA cases . . . . We believe that if Congressional intent to allow a seaman to arbitrate or sue at his option is manifest in the seaman's

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19. *Beckley v. Teytsler*, 332 F.2d 495 (9th Cir. 1964); *Evans v. Hudson Coal Co.*, 165 F.2d 970 (3rd Cir. 1948); *Watkins v. Hudson Coal Co.*, 151 F.2d 311 (3rd Cir. 1945), *cert. denied*, 327 U.S. 777 (1946); *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3 (3rd Cir. 1943).

20. *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972). Mr. Justice Rehnquist ordered that the writ of certiorari be dismissed as improvidently granted because, unlike the instant case, the collective bargaining agreement was not broad enough to give the arbitrator power to decide the issue.

act involved in *Arguelles*, as the Court held there, then an intent to give workmen such an option is also manifest in the Fair Labor Standards Act.

The above examination of statutes similar to Title VII and the cases arising under them serve to establish a critical premise which shall be assumed in the discussion, *infra*, that is, Alexander or any other similar Title VII claimant cannot be *forced* to arbitrate his claim in lieu of his Title VII action notwithstanding the provisions of the contract, that is to say, if an employee chooses to rely *exclusively* on his Title VII suit, he may do so.

IV.
SELECTION OF THE ARBITRAL FORUM SHOULD PRECLUDE THE STATUTORY ACTION.

This Court has expressly left open the question of the enforceability of an agreement to arbitrate a statutory claim where the agreement to arbitrate the dispute was entered into *after* the controversy arose. *Wilko v. Swan*, 346 U.S. 427 (1953).[21] And in *Arguelles* this Court did not specifically address the question of whether or not arbitration and court action are concurrent optional remedies or mutually exclusive procedures. It would seem that both questions must be resolved herein.

It is asserted by the Company that when Alexander submitted his cause to the arbitrator, an agreement to arbitrate the statutory claim *after* the controversy arose was thereby created. True, the arbitration agreement was existent prior to the controversy, but such agreement, as it applies to Alexander's case, merely describes the arbitral forum and makes the same available in the event that Alexander chooses it. Being a party to an existing controversy, Alexander invoked the arbitral procedures when he was not required to do so,[22] thus the question left open by this Court in *Wilko v. Swan, supra*, calls for an answer herein. For the reasons explicated *infra*,[23] the arbitrator's decision and award must be held to preclude an entire relitigation of the charge in a Title VII action.

While the *Arguelles* opinion was limited only to a finding that the seaman could exercise his statutory right to sue his employer, notwithstanding the existence of an arbitration agreement, there is contained in the concurring opinion of

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21. Although the *Wilko v. Swan* case is distinguishable from the case at bar because it involved an identical question but under a statute (Securities Act of 1933, 15 U.S.C. s 77a *et seq*) which prohibited any form of waiver of its enforcement provisions, to the extent that the question above was left open, 346 U.S. at 438-439, it is not distinguishable.

22. See discussion, Section III, *supra* p. 17.

23. See discussion commencing at paragraph 1, p. 23, *infra*.

Mr. Justice Harlan an inference that arbitration and court action are not concurrent optional remedies but mutually exclusive procedures.

> I think it obvious that the least desirable of all solutions would be to create a necessity for suits in both forums. In this circumstance, I think conflicting Congressional policies are best reconciled by the construing 46 U.S.C. § 596 and § 301 of the Labor-Management Relations Act as securing to the seaman an option to choose between arbitral and judicial forums where he states a claim under both the contract and 46 U.S.C. § 596. 400 U.S. at 366.

If we assume that the *Arguelles* court intended only one forum be available to the employee but he retains the option to choose the forum, then by analogy to *Arguelles* Alexander had a choice between Title VII and arbitration, just as Arguelles had between the Seamen's Act and arbitration. Once having made his choice, *Arguelles* would dictate that Alexander must live with the outcome of the chosen forum. But it would be presumptuous of the Company to assume that this Court intended exclusive remedies in *Arguelles* simply because of what the Company views as an inference of such in that decision. On a review of the considerations set forth below, the Company is persuaded that the inference of exclusive remedies in *Arguelles* must expressly be applied in the case at bar.

The Company suggests that the enormity of the labor arbitrator's function in today's industrial world and the necessity of rendering finality to his award is self-evident when the statistical data set forth below is given even a cursory examination. Based not on the assertion that practical considerations can override Congressional mandate where the mandate is clear, but rather on the assumption that Congress never intends to purposely create an impractical situation when conceiving and passing new legislation, practical considerations may also help this Court in placing the true Congressional intent underlying Title VII in focus.

The first fact of labor arbitrations which is irrefutable is that there are a lot of them, literally tens of thousands per year.[24] 94% of all collective bargaining agreements contain provisions for binding arbitration,[25] and in 1970 there were 160,000 collective bargaining agreements in the United States covering 25,000,000 employees.[26] Another truism is that almost half of all arbitrations involve employee discipline or discharge.[27] Since Title VII proscribes discrimination in employment based on race, color, religion, sex,[28] or national origin, it is not hard to conclude that a substantial portion of all employees who are disciplined or discharged under a union agreement are potential Title VII claimants. For instance, surely a good percentage of grievants are female, or Jewish, or aliens, or of Oriental or Spanish ancestry, not to mention those who are black or brown. Further, it can reasonably be anticipated that in this day of increased sensitivity on the part of minority groups to discriminatory employment practices, the issue of a discriminatory employment practice will be enmeshed in charges before the arbitrator, especially since 69% of collective bargaining agreements today contain non-discrimination clauses.[29]

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24. In fiscal year 1971 the Federal Mediation and Conciliation Service alone provided 13,235 panels of arbitrators, an increase of 18.9% over fiscal year 1970. 1972 BNA Labor Relations Yearbook 267. Additionally many thousands of arbitrations are conducted through the National Academy of Arbitrators, or arranged for privately by the parties. 20th Annual Meeting, National Academy of Arbitrators 45, 1971.

25. *Collyer Insulated Wire*, 192 NLRB No. 150, n. 20 (1971), *citing*, U.S. Department of Labor, *Major Collective Bargaining Agreements; Grievance Procedures*, BLS Bulletin 1425-1 (1964); *Arbitration Procedures*, BLS Bulletin 1425-6 (1966).

26. U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1750, Directory of National Unions and Employee Associations 87, 88 (1972).

27. 24 FMCS Ann. Rep. 55 (1971).

28. The New York Times, March 4, 1973, U.S. Business Roundup, recites an EEOC report (citation not presently available) which states it is estimated that sex discrimination charges now constitute as much as 40% of all incoming charges.

29. Broad non-discrimination clauses were contained in 46% of the collective bargaining agreements in 1969; 28% in 1966 and 22% in 1960. *See* 1969 BNA Labor Relations Yearbook 34; Basic Patterns in Union Contracts (7th ed. BNA 1971).

Thus it seems reasonable to conclude that a large portion of all labor arbitrations could be retried under Title VII,[30] as Alexander attempts here. As a result, the arbitration would operate only as a "trial balloon" for the grievant.[31] This very real possibility could lead employers to reject binding arbitration in their collective bargaining agreements as a means of settling industrial disputes.[32] Alternately, employers who have agreed to binding arbitration in the collective bargaining agreement may very well refuse to arbitrate selected cases, for instance, the discharge of a Negro claiming racial discrimination. Under those circumstances the employer's refusal to arbitrate the dispute cannot be called unreasonable or arbitrary since the employer can justifiably conclude that arbitration is an expensive exercise in futility. However, the employer's refusal to arbitrate in such circumstances creates disturbing reverberations in the courts and in the labor-relations field.

Upon an employer's refusal to arbitrate a grievance involving a Title VII question, it can reasonably be anticipated that the Union would request the U.S. District Court (under Section 301, *Lincoln Mills* and the *Steelworkers Trilogy*) to order the employer to arbitrate the dispute; however, the U. S. District Court conceivably would be unable to grant such relief since the District Courts' post-*Lincoln Mills* power to do so was derived, in part, on the fact that arbitration would be binding on all parties to the dispute. That mutuality of commitment to be bound by the arbitrator's award is a keystone of the *Lincoln Mills'* policy was made abundantly clear in *General Drivers Warehousemen and Helpers Union No. 89 v. Riss & Company, Inc.*, 372 U.S. 517 (1963); wherein this Court held that a

30. The same can be said of a multitude of arbitration cases not involving discipline or discharge, for instance, employer failure to promote, employer failure to follow job bidding or bumping rules, or even failure to provide free parking as required by the union contract where motivation proscribed by Title VII is alleged against the employer, and such prohibition is contained in the collective bargaining agreement.

31. To use the words of Judge Winner in his District Court opinion below, see App. 43.

32. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 332 (6th Cir. 1970); *aff'd* by an equally divided court 402 U.S. 689 (1971); *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 252 (1970).

decision by an industry "committee" created under the contract is as enforceable in a Section 301 action as an arbitrator's award "if . . . the award of the Joint Area Cartage Committee is under the collective bargaining agreement *final and binding* . . ." 372 U.S. at 519 (Emphasis supplied.); ergo, unless the award is to be final and binding, the District Courts conceivably lack the power to order arbitration.

Further, since the *quid pro quo* for the no-strike guarantees in the collective bargaining agreement is the employer's willingness to proceed to binding arbitration on a dispute,[33] upon an employer's expressed unwillingness to arbitrate a given dispute because it is of a Title VII nature, the Union could conceivably strike in an effort to settle the dispute despite the no-strike provisions of the agreement without being subject to a court injunction under *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970), since the consideration offered by the employer for the Union's restraint has failed.

Thus, it becomes apparent that the Court's decision in this case cannot permit the use of multiple forums to decide the same issue without bringing about the tragic demise of the one form of private settlement of industrial labor disputes which has proved popular and workable and without creating legal and practical chaos in the labor relations world.

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33. *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 247, 248 (1970); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 567 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

V.
TREATMENT OF THE INSTANT QUESTION BY FEDERAL CIRCUIT COURTS.

Federal Circuit Courts have treated the same problem differently, leaving a morass of confusion. What can be said generally of the circuit courts' decision is that they show, chronologically, an increasing degree of judicial revulsion to permitting a claimant multiple forums in which to be heard on the same issue.

The Seventh Circuit ruled in 1969 that arbitration could have no effect on a Title VII action, *Bowe v. Colgate-Palmolive Co.*,[34] 416 F.2d 711 (7th Cir. 1969). In 1970 the Sixth Circuit concluded that arbitration was binding and depositive of the Title VII action, *Dewey v. Reynolds Metal Co.*,[35] 429 F.2d 324 (6th Cir. 1970), *aff'd* by an equally divided court 402 U.S. 689 (1971) (Mr. Justice Harlan not participating), but later that holding was qualified and limited to cases where the Title VII

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34. Women employees working under a collective bargaining agreement filed a Title VII sex discrimination suit against both the union and the company. The district court required the women to elect between court action and arbitration which had not yet been invoked. *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332 (S.D. Ind. 1967). The Court of Appeals for the Seventh Circuit reversed and held that a plaintiff could simultaneously proceed in both forums because "there may be crucial differences between the two processes and the remedies afforded by each." 416 F.2d at 715. The court also found conclusive the analogy to a charge before the National Labor Relations Board under the Labor-Management Relations Act where an arbitrator proceeds simultaneously on the same charge under the contract. The court concluded that election of remedies applies only after final decision is reached in both forums, in order to prevent unjust enrichment.

35. Dewey claimed that he was wrongfully discharged because of his religious beliefs. The employee filed a grievance and a state civil rights complaint simultaneously. The arbitration award was rendered first and denied the relief sought. As a result, the Court of Appeals held that the Title VII suit, which was subsequently filed, would not be allowed. The Court held that the Sunday overtime provision of the collective bargaining agreement was not discriminatory on its face or on its impact, and therefore, the employer's actions with regard to accommodation of Dewey's religious needs were not unreasonable.

action is filed after the arbitrator's award only. *Spann v. Kaywood Division, Joanna Western Mills Co.*,[36] 446 F.2d 120 (6th Cir. 1971). The Fifth Circuit recently held that a court may defer to an arbitrator's award if a number of specified conditions are met, *Rios v. Reynolds Metals Co.*,[37] 467 F.2d 54 (5th Cir. 1972), and even more recently the circuit court for the District of Columbia seemed to imply adoption of a deferral policy. *Macklin v. Spector Freight Systems, Inc.*, ___F.2d ___,

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36. A Negro employee was reinstated by an arbitrator to his job without back pay and the court refused to allow the employee to maintain a Title VII action for such back pay. The court emphasized that Spann like Dewey, only filed his court action after an award was made by the arbitrator. In *Spann*, the court did not address the issue where a Title VII action might precede the arbitration award. The court was repelled by the " 'successive monogany' of remedies.", (446 F.2d at 123) sought by Spann and Dewey, *i.e.*, arbitration, state civil rights commission, EEOC, and Title VII. Compare, *Newman v. Avco Corp., Aerospace Structural Division*, 451 F.2d 743 (6th Cir. 1971) which arose on *Spann's* heels. The court found therein that the contract did not prohibit racial discrimination, that the issue in the Title VII action was not before the arbitrator, that the arbitration hearing was not fair and impartial and therefore the case was remanded for trail under Title VII. The court described its *Dewey* and *Spann* theories as the equitable doctrine of estoppel. *See also Thomas v. Philip Carey Mfg. Co.*, 455 F.2d 911 (6th Cir. 1972).

37. A Mexican-American employee raised, *inter alia*, the issue at arbitration of racial discrimination and had filed his Title VII action in district court prior to the arbitration. The district court granted summary judgment for the employer. In remanding the case for trial, the Fifth Circuit defined explicitly the impact of an arbitrator's award on a Title VII action where the contract proscribed employer action against an employee based on racial discrimination. Analogizing to the NLRB's Spielberg Doctrine (*Spielberg Mfg. Co.*, 112 NLRB 1080 (1955)) wherein the Board determined that under circumstances it deemed to be proper, the Board would defer to an arbitration where the issue was identical to that before the Board. The Fifth Circuit decided that district courts can defer to an arbitrator's award only if the employer can prove that seven specified conditions were met in the arbitration proceeding. See p. 34, *infra*, for a recitation of those conditions.

5 FEP Cases 994 (D.C. Cir. 1973).[38] Alexander's suggestion herein is that the arbitrator's decision and award should have only the status of evidence in the Title VII action.[39] In analyzing the problem, some of the courts used, attempted to use, or rejected traditional concepts of collateral estoppel, res judicata, or election of remedies; the Company herein will avoid the use of such terms for the reasons expressed below.

38. But the *Macklin* court interpreted *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), as establishing "a federal policy of deferrance," ___ F.2d ___, 5 FEP Cases at 1002, which, considering the case at bar, would appear to constitute an overly presumptuous reading of *Enterprise*.

39. Brief for Petitioner at 41.

VI.
TRADITIONAL PROCEDURAL RULES OF JUDICIAL ADMINISTRATION ARE INAPPLICABLE TO THE CASE AT BAR.

Long standing procedural rules of judicial administration such as election of remedies, res judicata, collateral estoppel or combinations of them are interwoven in judicial analyses in cases similar to the one at bar. We submit that the resultant confusion is caused by the search for classical answers to non-classical and contemporary problems. These rules have their genesis in ordinary public policy considerations. Not only have these doctrines been ill-defined and abused in application, but the attendant result has been mass confusion and questionable jurisprudence.

The doctrine of election of remedies generally holds that one who makes a knowing and voluntary adoption of two or more inconsistent remedial rights (for example, contract rescission vs. contract damages) is precluded from resorting to one or the other.[40] Although the United States Supreme Court long ago referred to the election of remedies rule as "harsh" and "largely obsolete", *Friderichsen v. Renard,* 247 U.S. 207, 213 (1918) lower courts have nevertheless attempted to utilize the doctrine in wrestling with an arbitral determination on a discrimination question and its impact on a subsequent Title VII action.[41] By its very definition the doctrine has no application

40. Comment, *Title VII of the Civil Rights Act of 1964 Employee's Pursuance of the Collective Bargaining Grievance Procedure Held to Bar Subsequent Judicial Proceedings on a Racial Discrimination Complaint,* 44 N.Y.U.L. Rev. 404 (1969); Comment, *Dewey v. Reynolds Metal Co.: Labor Arbitration and Title VII,* 119 U.Pa. L. Rev. 684 (1971).

41. *Oubichon v. North American Rockwell Corp.,* 325 F. Supp. 1033, (C.D. Cal. 1970); *Newman v. Avco Corp.,* 313 F. Supp.1069, 1071 (M.D. Tenn. 1970); *Fekete v. United States Steel Corp.,* 300 F.Supp. 22, 23 (W.D. Pa. 1969); *Edwards v. North American Rockwell Corp.,* 291 F.Supp. 199, 208 (C.D. Cal. 1968); *Washington v. Aerojet-General Corp.,* 282 F.Supp. 517, 523 (C.D. Cal. 1968); *Bowe v. Colgate-Palmolive Co.,* 272 F.Supp. 332, 339 (S.D. Ind. 1967). The doctrine has been used and confused with other arguments thereby resulting in much misunderstanding. *Dewey v. Reynolds Metal Co.,* 291 F.Supp. 786, 788 (W.D. Mich. 1968); *Bowe v. Colgate-Palmolive Co., supra, Edwards v. North American Rockwell Corp.,* 291 F. Supp. 199, 208 (C.D. Cal. 1968), ("Plaintiff made a binding election of forums and remedies.")

to the issues now under consideration. Not only does the plaintiff in a Title VII action expressly rely upon the same basic facts asserted in the arbitration but, also, the remedies provided by each forum have close identity, and, while they may be duplicative, they are not inconsistent.[42]

The use of the doctrines of res judicata and collateral estoppel to preclude a Title VII action is likewise misplaced when considered in light of strong policy considerations attendant to the Civil Rights Act. Both doctrines are rooted in a policy which favors finality, to the exclusion of all other counterveiling interests. In its application, res judicata limits the litigant to one fair trial of a cause, *Fayerweather v. Ritch*, 195 U.S. 276 (1904); 50 C.J.S. Judgments § 592 (1947), and collateral estoppel prevents litigation of issues already determined without regard to identity of the causes of action. *Lawlor v. National Screens Service Corp.*, 349 U.S. 332, 326 (1955); Moore's Federal Practice, 0.405(1) 2d Ed. (1965). The fatal flaw contained within each doctrine is that it operates summarily to cut off the rights of the litigant, and they are not broad enough even to permit judicial review of the prior judgment to determine the appropriateness of deferral to it. In matters of employment discrimination, any classical doctrine that operates to summarily terminate the airing of a claim having an overriding public interest cannot be endured. Whatever analysis this court ultimately makes of the case at bar, it must provide for a judicial peek at the prior proceedings in order to safeguard the public interest.

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42. A classic example of the confusion which reigns in the application of this traditional doctrine is contained in the case at bar. In Alexander's brief, page 43, Alexander describes the rationale of the courts below in this case as relying upon "election of remedies" since the courts below relied upon *Dewey v. Reynolds Metals Company, supra.* However, the *Dewey* court in a subsequent case, *Newman v. Avco Corp.*, 451 F.2d 743 (6th Cir. 1971) at N. 1 described its *Dewey* doctrine as "themes of res judicata and collateral estoppel" and specifically disavowed the doctrine of election of remedies.

VII.
ANALYSIS OF THE VARIOUS CIRCUITS' REASONING AND ALEXANDER'S POSITION.

Each of the four theories must be separately analyzed and weighed.

A. Arbitration is Never Preclusive of a Title VII Action (Seventh Circuit).

To conclude that a Title VII action is never precluded by an arbitrator's award on the same issue is contrary to this Court's previously discussed arbitration doctrine and amounts to carving an exception to the principle established in *Lincoln Mills*, the *Steelworkers Trilogy* and their progeny which concluded that labor arbitration must be underpinned and strenuously reinforced by the courts. When one considers the enormous number of workers included in the five classes of claimants protected by Title VII, the number of collective bargaining contracts that contain non-discrimination clauses today,[43] and the likelihood that the grievant will enmesh his or her discrimination claim in the arbitration proceedings, (as did Alexander), one realizes that the exception to the *Lincoln Mills* principle espoused by the Seventh Circuit in *Bowe* must necessarily be so broad as to engulf the rule, since the exceptions conceivably constitute a significant portion of all labor arbitration cases heard today. The case of Alexander and his allegations of discharge based on racial discrimination is only the tip of the iceberg.

B. Arbitration Precludes a Title VII Action Only if the Title VII Action was Filed After an Adverse Arbitration Award (Sixth Circuit).

The Company herein submits that the chronological sequence used by the employee in the selection of forums is not material at all to the question of the finality of the arbitrator's award. First, it is apparent that in a normal grievance-arbitration case the contract procedures will be concluded and the arbitrator's award rendered before an employee can fulfill the statutory

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43. See Note 29, *supra*.

conditions precedent to the filing of a Title VII action,[44] and so in almost every instance the Title VII case would be filed too late and subject to automatic dismissal under the Sixth Circuit's reasoning in *Spann*. If a statutory action is to be precluded by an arbitrator's award, a sounder reasoning would seem necessary.

In *Spann* the Sixth Circuit indicated that simultaneous use of both methods of procedure, *i.e.*, arbitration and the commencement of statutory steps, will preserve the Title VII action from attack later when the employee received an adverse arbitration award. This, too, does not withstand critical analysis. When an employee commences his statutory remedies by filing with a state agency prior to the arbitrator's award (as did Alexander), he thereby indicates his awareness of his statutory action and thus establishes his ability to knowingly preserve his Title VII action by *not* submitting the discrimination question to the arbitrator. It follows that if he does continue to charge discrimination in the arbitral forum he thereby indicates that he chooses to cast the fortunes of his discrimination claim upon the arbitral waters. For this reason, the

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44. For the statutory procedures followed subsequent to the filing of a charge in a Title VII action see Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 42 U.S.C.A. §2000e-5 (Supp. 1972).

It seems fair to conclude that these statutory guidelines are in actuality rarely if ever attained. For example, in the fiscal year ending June 30, 1972, the EEOC had a total of 52,000 charges alleging discriminatory practices. Of this number 33,000 were new charges. By deduction this would mean that 19,000 cases were carried over from the previous year which had not even reached the stage of being recommended for investigation. It seems reasonable to conclude that these 19,000 cases were at least one year old. In fiscal year ending June 30, 1971, the EEOC had a total of 33,000 charges of which only 23,000 were filed during that year leaving 10,000 cases older than one year. By the end of the fiscal year June 30, 1973, it is projected that a backlog of 70,000 complaints will exist. *See The New York Times*, March 4, 1973, U.S. Business Roundup; *See U. S. News and World Report*, June 18, 1973, p. 89, "The agency backlog of complaints now totals at least 60,000 cases."

Compare: In 1970 the average time lapse between a request for an arbitrator and the rendering of an award was 164.2 days, 1971 BNA Labor Relations Yearbook 283.

Company views the simultaneous use of both contract and statutory procedures to have a preclusive impact upon the Title VII action, rather than a permissive impact as the Sixth Circuit views it.

C. A Court May Defer to an Arbitration Award Under Stringent Guidelines (Fifth Circuit and possibly Circuit Court of Appeals for the District of Columbia).

In its *Rios* decision, the Fifth Circuit concluded that courts may, under specified conditions, defer to an arbitrator's award. The conditions specified read:

> First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities. The burden of proof in establishing these conditions of limitation will be upon the respondent as distinguished from the claimant. (467 F.2d at 58)

While a concept of deferral is not wholly repugnant to the Company herein,[45] the *Rios* rules of deferral contain a clearly fatal flaw, that is, an arbitration of a Title VII type claim would have to compare favorably, both procedurally and substantively, with a trial the claimant would receive in U. S. District Court.

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45. *See* Suggestion of Company, Section VIII, p. 37, *infra.*

Under *Rios* deferral rules a prudent company would of course want to be represented by counsel at such a hearing and would insist on a transcript of the proceedings; the arbitrator would naturally apply more strict rules of evidence and may even be faced with questions concerning some limited forms of discovery, and the arbitrator would certainly schedule a longer hearing than usual in order to accommodate the company's District Court-type advocacy. At the conclusion of the hearing the arbitrator would then attempt to issue a decision and award that conforms in all respects to a detailed and written Findings of Fact and Conclusions such as one would expect to be rendered by a U. S. District Court. The arbitration procedure, under *Rios*, therefore becomes exactly that which it was intended not to be: 1) lengthy, 2) costly, 3) unnecessarily complicated, 4) legalistic. The arbitrator's ability to dispense timely industrial justice is materially hampered. Further, under the multiple rules of *Rios* for deferral, the district court would find itself holding a hearing to determine if deferral was appropriate, which hearing could, we fear, in length and complexity be similar to a Title VII trial.

D. The Arbitration Award Should Only Be Considered as Evidence in A Title VII Action (Alexander's Theory).

Alexander's suggestion that an arbitrator's award be relegated to the status of evidence (presumably probative evidence) in a Title VII action is subject to the same criticism as set forth above with respect to the Seventh Circuit's decision in *Bowe, i.e.*, it emasculates the degree of respect and finality traditionally and necessarily accorded a labor arbitrator's award.

Alexander, in support of his assertion, cites *Smith v. Universal Services, Inc.*, 454 F.2d 154, *rehearing denied*, 454 F.2d 154 (5th Cir. 1972). The court therein held that it would be a waste of manpower and resources to ignore as evidence in a Title VII action the report of the EEOC investigator, and that the report would constitute an exception to the hearsay rule under the Federal Business Records Act, 28 U.S.C. § 1732 (1970). In the case at bar, the arbitration award would not, of course, fall under the Federal Business Records Act and simply remains hearsay and inadmissible. On Petition for rehearing in *Smith* which was denied, a sharply critical dissent was entered by

Judge Dyer, asserting in part that the EEOC report was simply hearsay and not admissible. If the arbitration award and an EEOC report raise the same question of admissibility, once the Federal Business Records Act is put aside, the comments of Judge Dyer, 454 F.2d at 160-61, relating to the hearsay question, are appropriate here:

> The opinion instructs the district court that it is obligated to hear evidence of *whatever nature* that is probative. Not only do I disagree with the breadth of this pronouncement but it would seem clear that this type of evidence is not categorically 'probative.' As the opinion points out, the EEOC report 'contains findings of fact made from different witnesses, subjective comment on the credibility of these witnesses and reaches [a] conclusion.'
>
> The credibility of witnesses has historically been the sole function of the fact finder. An opinion concerning credibility by a so-called expert would be superfluous and inadmissible. 7 Wigmore, Evidence § 1918 (1940). McCormick, Evidence § 12 (1954); Note, Revised Business Entry Statutes; Theory and Practice, 48 Colum. L. Rev. 920, 930 (1948). The judge, as the fact finder in a Title VII suit, is hopefully more of an expert on the credibility of witnesses than is an EEOC investigator.
>
> * * * * *
>
> It is undisputed that the EEOC report is merely a cumulation of hearsay and contains the opinion of the investigator based upon his credibility choices with respect to the hearsay.[46]

Additionally, the Company continues to strenuously assert that Alexander's theory is subject to the same criticism as the *Bowe* decision of the Seventh Circuit as expressed in Section VII (A) *supra*, that is, it emasculates this Court's past doctrine of underpinning labor arbitration.

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46. *See also Heard v. Mueller Co.*, 464 F.2d 190 (6th Cir. 1972).

VIII.
THE COMPANY'S SUGGESTION.

Having found each of the various theories proffered by the circuits and Alexander unacceptable as explained above, the Company herein presumes to suggest to this Court a solution that appears to the Company to be consistent with the desires of Congress and this Court's past policies in the areas of Title VII and labor relations, and which appears to be the only workable solution. The Company suggests that this Court adopt a policy of liberal deferral to the arbitral award when that forum is chosen by the Title VII plaintiff. *This is not to suggest that the multi-faceted Rios deferral formula be employed.* (See criticism at Section VII(C), p. 34 *supra*) but it is to suggest a deferral by the federal courts to the decision in the arbitral forum if the following criteria are met:

1. The charge of discrimination was before the arbitrator.

2. The contract prohibited the form of discrimination charged.

3. The arbitrator had authority to rule on the charge and fashion a remedy.[47]

Limited judicial review of arbitration awards is not novel. Plenary judicial review of the arbitrator's decision would render arbitration a meaningless exercise, merely a condition precedent to final determination by the courts; it would be "the commencement, not the end, of litigation." *Burchell v. Marsh*, 58 U.S. (17 How.) 96, 99 (1855). In *Enterprise Wheel & Car Corp., supra*, 363 U.S. at 596 this Court stated:

> The refusal of the courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the award.

47. Each of the three listed elements was present in the case at bar.

That the choice by an employee of the arbitration forum may result in the employee's case being considered in a manner somewhat different in form than the consideration his case would probably receive in district court, is of course a possibility.[48] However, in *Arguelles, supra*, Mr. Justice Harlan, in concurring, recognized that possibility and stated at 400 U.S. 359-60:

> This Court has always recognized that the choice of forums inevitably affects the scope of the substantive right to be vindicated before the chosen forum. In particular, where arbitration is concerned, the Court has been acutely sensitive to these differences.

And at 400 U.S. 361:

> Normally, the impact on the substantive right resulting from the decision to remit the individual to the arbitral forum is acceptable because the parties themselves have consented to that forum.

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48. There is no requirement that counsel be present for either side at arbitration hearings, or that witnesses be sworn, or that the rules of evidence be applied; arbitrators need not make a written explication of their award although almost all do. *United Steelworkers v. Enterprise Wheel & Car Corp., supra*, 363 U.S. at 598.

On the other hand, in the arbitration of a discipline or discharge case, the company has the burden of proof, and to that extent the employee alleging the application of discriminatory employment practices in his discharge or discipline has a greater advantage than he would have in the United States District Court in a Title VII action. The burden of proof placed upon the employer which it must meet in order to convince the arbitrator that the discipline or discharge was for just cause is measured by different standards depending on the case and the arbitrator. Sometimes a "beyond a reasonable doubt" standard is used, *A. S. Beck Shoe Corp.*, 2 Lab.Arb. 212 (1944); or "clear and convincing", *Aviation Maintenance Corp.*, 8 Lab. Arb. 261 (1947); or "clear, unequivocal and convincing", *Armco Steel Corp.*, 48 Lab. Arb. 132 (1967); or "preponderance of evidence", *Campbell Wyant and Cannon Foundry Co.*, 1 Lab.Arb. 254 (1945). In determining the burden of proof which the employer must meet, arbitrators appear to increase the severity of the burden concomitant with the severity of the conduct alleged against the employee.

The key is the consent of the employee. It is submitted that Congress in Title VII gave the employee a right to sue,[49] and as possessor of that right the employee may use it fully by filing a comprehensive Title VII action, or not use it at all, or use it partially (by bringing an individual action rather than a class action) or submit it to another forum. It is noted here, again, that this Court has expressly left open the question of whether or not an agreement to arbitrate would be binding on a statutory claim if the agreement to arbitrate was entered into after the controversy arose.[50] Having established that Alexander could not have been forced to test his discrimination claim in the arbitral forum,[51] but did so voluntarily after he was aware of his Title VII claim,[52] it must follow that Alexander is bound by the arbitration award, as is the Company. In this context it is important to note that the Company does not even suggest that Alexander should be precluded from filing a charge with the EEOC because of the arbitration award; to do so would clearly be inconsistent with the mandates of the Act. If the EEOC in its wisdom should later determine that there are compelling public policy reasons to pursue the matter through the courts on behalf of a class of employees similarly situated, it retains the statutory prerogative to do so by instituting its own suit.

The critic of the Company's suggestion will understandably point out that a union or employer might coerce the employee into selecting the arbitral forum, or the union may purposefully under-represent the employee's interests, or collusion

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49. Of course, Congress in 1964 also gave the Department of Justice the right to sue in cases wherein "the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance." . . . to the rights protected by Title VII. Pub. L. No. 88-352, 78 Stat. 261, 42 U.S.C. §2000e-6 (1970). In 1972, Congress gave the Equal Employment Opportunity Commission enforcement powers and the right to file civil actions. Pub. L. No. 92-261, 86 Stat. 104, 42 U.S.C.A. §2000e-5 (Supp. 1972).

50. See discussion Section IV, *supra*, p. 22.

51. See discussion Section III, *supra*, p. 17.

52. It will be recalled that Alexander commenced his statutory procedures, *i.e.*, the filing of a charge with the Colorado Civil Rights Commission prior to the arbitration hearing.

between the union and the company may result in the repression of relevant evidence. However, under well-established law, such instances, if provable, would not result in the forfeiture of the employee's Title VII action,[53] and these traditional safeguards against coercion, fraud, etc., are included implicitly in the Company's proffered doctrine.

The critic might also point out that under most collective bargaining agreements, including the one now before the Court, the offended employee has only a handful of days to file his grievance or lose it, thus placing an onerous and perhaps impossible burden on the unsophisticated employee to make an intelligent choice of forums quickly, assuming he is even aware he has a choice. Half the answer to that problem is that if the employee lets the short grievance filing time run without filing his grievance, he has his Title VII action yet available. The other half of the answer is that if he files the grievance, he cannot be precluded from his Title VII action until he voluntarily submits his case to the arbitrator; this is not an arbitrary cut-off point since there is a vital and distinct difference between the reason for grievance steps and the nature of the arbitration step. All grievance steps have one object, that is, a voluntary solution of the problem by union and management. One must acknowledge that the employee's individual interests may not be accorded the highest respect in the various grievance stages; it is a fact of industrial labor relations that grievances are oftentimes traded off against other grievances; it is also a fact that grievance steps rarely present the employee with an opportunity for a full hearing; it is another fact that grievance settlement presents the union and the company with an unquestionable opportunity to conspire against the employee if they are of such a bent.

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53. Fed. R. Civ. P. 60(b) states in part: ". . .[T]he court may relieve a party of his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . ." *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944); *Marshall v. Holmes*, 141 U.S. 589 (1891); *Griffith v. Bank of New York*, 147 F.2d 899 (2d Cir.), *cert. denied*, 325 U.S. 874 (1945).

On the positive side, the grievance steps may result in a settlement that is satisfactory to all parties, including the employee, and the opportunity for such settlement ought not be hampered, as would naturally result if the act of filing a grievance resulted in closing the courthouse door to the employee. The concept of the arbitration step contrasts sharply with the nature of the grievance steps since at arbitration the parties have irrevocably agreed to submit their disagreement to the impartial arbitrator for a final and binding award. Logically then, it would seem that the Title VII action of the employee cannot be precluded until he voluntarily submits the same charge to the arbitrator; practically, this will provide sufficient time for the employee to ponder which forum to choose.

IX.
THE 1972 AMENDMENTS DO NOT CHANGE THE COMPLEXION OF THE INSTANT CASE.

The 1972 Amendments to the Civil Rights Act added language to the 1964 Act which described the status of determinations made by State or local agencies, in that the EEOC was directed to ". . . accord substantial weight to final findings and orders made by State or local authorities." Section 706(6)(b), Pub. L. No. 92-261, 86 Stat. 103, 42 U.S.C. § 2000e-5(b). Alexander asserts that the reluctance of Congress to give binding effect to a State or local determination is evidence of its intent that the federal courts be the final arbitor in every case of any Title VII claim. Brief for Petitioner, p. 17-18. A comparison of State or local determinations to that of an arbitrator is inappropriate for there is a critical difference between the two that defeats the validity of the comparison. Arbitration is a *consensual* relationship between the employee and his employer while State or local proceedings arise from a charge required to be filed by the employee if he desires access to the EEOC and to which the employer must, by law, respond. Thus, since the State procedures are mandatory and since potential infirmities exist in some State or local procedures or laws, it was the concern of Congress that an employee not be *required by law* to accept those infirmities, and the 1972 Amendments state expressly what impliedly was mandated in the 1964 Act. Senator Joseph Clark, in reference to this concern before passage of the 1964 Act, stated:

> . . . State and local FEPC laws vary widely in effectiveness. In many areas effective enforcement is hampered by inadequate legislation, inadequate procedures, or an inadequate budget. Big interstate industry cannot effectively be handled by the States. 2 Schwartz, Statutory History of the United States: Civil Rights 1290 (1970)

Congress only was concerned that no other sovereign, law, or procedure *require* Alexander to accept less than his day in Federal District Court on his civil rights claim, and Congress did not address itself to a *voluntary choice* by Alexander after the controversy arose to test his claim in another forum.

X.
IMPACT ON THE CASE AT BAR OF MULTIPLICITY OF REMEDIES ALREADY EXISTING FOR THE EMPLOYEE.

In Alexander's brief before this Court, the controversy between Alexander and the Company herein is paralleled to the Biblical confrontation between David and Goliath. Alexander asserts that David (Alexander) is not unfairly equipped for battle with Goliath (the Company) if David is given two stones (arbitration and Title VII) for his sling. The Company (Goliath) is pictured as a behemoth with "armoured columns and nuclear weapons" to aid him in the confrontation.[54] When one reflects upon the broad range of laws, executive orders and administrative policies under which a minority employee offended by an alleged act of employment discrimination can vindicate his rights (free of cost), and when one considers that the Civil Rights Act as amended in 1972 applies also to small businesses having 15 or more employees,[55] one must then ponder whether the roles in the David and Goliath comparison are not in fact reversed, that is to say, one has cause to speculate on who is David and who is Goliath?

As recited in Petitioner's Brief,[56] there are at least *seven* remedies created by Congress and the executive to which an offended minority employee may resort, none of which are exclusive and all of which are provided the employee without expense.[57] In the case at bar Alexander would seek to add yet another, arbitration.

In 1972, the Deputy General Counsel of the EEOC, John D. J. Pemberton, Jr., described an employer's dilemma on matters of alleged employment discrimination and litigation with respect thereto, accurately and succinctly when he stated: "But if the number of them [multiple employee remedies] is not awesome

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54. Brief for Petitioner at 42.

55. Pub. L. No. 92-261, 86 Stat. 103, 42 U.S.C.A. §2000e(b) (Supp. 1972).

56. Brief for Petitioner at 20-22.

57. In many instances this may include court-appointed counsel, as in Alexander's case.

enough, the lack of finality in any decision on behalf of the respondent certainly poses a defendant's nightmare."[58] Surely, in passing Title VII, Congress only intended to provide a powerful tool with which to eliminate employment discrimination and certainly did not intend to create a nightmare of litigation for anyone.

One must accord the late Senator Dirksen some measure of clairvoyancy when, during the Senate debates on Title VII, he protested such a scheme as is here proposed by questioning:

> Should we draw and quarter the victim?[59]

58. Address by John D. J. Pemberton, Jr., Deputy General Counsel, Equal Employment Opportunity Commission, August 15, 1972, at the Annual meeting of the American Bar Association, San Francisco, California, Section on Labor Relations Law, BNA Bull. No. 160 (1972).

59. 110 Cong. Rec. 6449 (1964) (Remarks of Senator Dirksen). It is appropriate here to note that Alexander requested an award of attorneys' fees in the event this Court orders a remand. (Brief for Petitioner at 49). Petitioner's supplication overlooks the possibility that the Company may be innocent of the charge alleged, and Petitioner is in error when it states (Brief for Petitioner at 49, n. 16) that such an award of attorneys' fees is authorized by Title VII. Section 2000e-5(k) of the statute can only be read to warrant attorneys' fees in the event the charges alleged are found to be true.

CONCLUSION

For the reasons explicated above, this Court is respectfully urged by the Company to apply a policy of liberal deferral to the arbitrator's award, to determine that the lower courts herein properly conformed to that policy, and to affirm for those reasons.

Respectfully submitted,

Robert G. Good
Law Offices of Robert G. Good
& Associates, P.C.
733 Guaranty Bank Building
Denver, Colorado 80202
534-0273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5847

HARRELL ALEXANDER, SR.,
Petitioner,

vs.

GARDNER-DENVER COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

MILTON A. SMITH
General Counsel

O. F. WENZLER
Labor Relations Counsel
Chamber of Commerce of
the United States
of America
1615 H Street
Washington, D. C.

JAY S. SIEGEL
SIEGEL AND O'CONNOR
1747 Pennsylvania Ave.
Washington, D. C.

Attorneys for the Amicus Curiae

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE AMICUS CURIAE *

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 38,000.

* This brief is filed with the written consent of both parties pursuant to Supreme Court Rule 42(2).

The issue in the instant case—accommodation of the national labor policy on arbitration with the statutory right of employees with claims of alleged discrimination in employment—is a matter of significant national concern. Numerous employers throughout the country are engaged in interstate commerce and under the 1972 amendments now come within the provisions of Title VII of the Civil Rights Act of 1964. Further, a substantial number of these employers have collective bargaining agreements containing both no-discrimination clauses as well as grievance and arbitration procedures to resolve disputes involving their employees arising under such agreements.

The Chamber appeared as *amicus* when this question was previously presented to the Court but left unresolved in *Dewey* v. *Reynolds Metals Company*, 402 U.S. 689, 3 FEP cases 508 (1971). At that time the undersigned Counsel urged the Court adopt a form of collateral estoppel as a viable method of accommodation on the issue set out above. The interest of the National Chamber in the outcome of this litigation is vital. It appears before this Court as *amicus curiae* to again urge a realistic approach on the pending cause urging affirmance of the decision below, predicted on the substantial and far-reaching consequences that the result in this case will have not only for American industry, but for the arbitration process, a mainstay of the national labor policy.

I. STATEMENT OF THE CASE

Petitioner is before the Court seeking another opportunity to attempt to establish his alleged claim of racial discrimination, notwithstanding the fact that he has been told there is no basis for such claim by a distinguished labor arbitrator and state and federal civil right agencies.[1]

[1] It should be patently clear that Petitioner is here without a single inferior tribunal, including the EEOC, having found any basis for his allegation of racial discrimination.

The facts underlying Petitioner's claim, as well as a descriptive history of the prior investigation and litigation, are fully set forth in an accurate manner in the brief of Respondent Gardner-Denver Company. The Petitioner in his brief unfortunately has overstated the facts and his appellate counsel has engaged in substantial *post-hoc* rationalizations of Petitioner's subjective motives in the arbitration process.[2] The *amicus* can add little except to emphasize that the central area of inquiry here is the number of opportunities a litigant should be afforded to prove a claim that he alone believes has merit.

II. QUESTIONS PRESENTED

A. Whether an employee who has voluntarily invoked the grievance and arbitration procedures in a collective bargaining agreement with respect to a claim of alleged wrongful discriminatory action and received an adverse arbitration decision is entitled to unilaterally repudiate such award and demand *de novo* consideration of his claim in the federal courts under Title VII of the Civil Rights Act of 1964?

B. What are the appropriate guidelines for the federal trial judiciary to follow in considering whether or not to defer to the decision of an arbitration award adverse to a litigant in an action under Title VII of the Civil Rights Act for employment discrimination?

III. SUMMARY OF ARGUMENT

Faced once again, as in *Dewey* v. *Reynolds Metals Corp.*, supra, with the dual national policies involving (1) the issue of remedies for alleged claims of employment discrimination, and (2) the finality of arbitration awards under collective bargaining agreements, the Court is urged to adopt a modern day form of the rule of col-

[2] *Cf. NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 444, 58 LRRM 2721, 2723 (1965).

lateral estoppel sanctioning deference to existing arbitration awards on claims involved in Title VII litigation. Further, through the delineation of guidelines for the lower federal courts to follow in honoring such awards, this court will permit the accommodation of two desirable national policies and substantially reduce the amount of duplicate and wasteful litigation that threatens to engulf an already overburdened trial judiciary.

Recognizing that enhancement of arbitration as a viable instrument for the settlement of industrial disputes can be harmonized with the elimination of discriminatory practices and artificial barriers that impede citizens from achieving equality of employment opportunity, the Court is urged to chart a middle ground and avoid the course urged by Petitioner which would have the ultimate effect of elevating one area of national policy over another.

Specifically the Court is urged to hold that when an employee has received an adverse arbitration award under a collective bargaining agreement on a claim of discrimination, such award should be accorded a degree of finality by directing the trial courts to make specific inquiry as to whether or not it should honor such award and terminating litigation before it under Title VII thus avoiding the need for a lengthy and repetitious consideration of a claim already heard and rejected by a competent tribunal.

Further, the Court is urged to establish the criteria which a Title VII litigant must meet to overcome the arbitration award as a bar and obtain a *de novo* hearon his Title VII claim in the federal District Courts. Such standards, as are suggested *infra*, would furnish appropriate guidelines for the Courts below and place future litigants on notice that they may not with impunity avoid the consequences of arbitration awards duly

rendered under processes invoked by them. Only in such a way can the Court secure the national labor policy while protecting the rights of citizens to seek relief in the Federal Courts, on a non-vexations basis under the Civil Rights Act of 1964.

IV. ARGUMENT

A. THE CIVIL RIGHTS ACT SHOULD NOT BE UNDULY CONSTRUED TO INVEIGH AGAINST THE NATIONAL LABOR POLICY FAVORING VOLUNTARY ARBITRATION OF LABOR DISPUTES: ACCOMMODATION IS IN THE PUBLIC INTEREST.

From the time *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957) was decided, this Court has followed a virtually unswerving path in making voluntary arbitration one of the mainstays of the nation's labor policy. In the "Steelworkers Trilogy"[3] the Court created the framework for the policy. Later cases added to the substance, particularly by making utilization of the grievance-arbitration provisions a prerequisite to a court suit. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 58 LRRM 2193 (1965); *Vaca* v. *Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967).

Finally, in *Boys Markets, Inc.* v. *Retail Clerks*, 398 U.S. 235, 74 LRRM 2257 (1970), the Court corrected the only deviation from its otherwise consistent path by holding that Federal courts have power to enjoin strikes in violation of a collective bargaining agreement where the issue in the strike is subject to an arbitration provision.

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[3] *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

At the same time there is little argument that the 1964 Civil Rights Act is major legislation expressing the public interest in a field of concern to all citizens. Title VII thereof was intended to eliminate discriminatory preferences for any group, majority or minority, and the removal of artificial barriers to employment. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 3 FEP Cases 175 (1971).

The Court in the instant case is faced with having to effect a reconciliation with these twin areas of the national interest which, standing alone, are highly desirable on their own merits. The *amicus*, unlike Petitioner, believes that a harmonious accomodation can be effected and would not give "highest priority" to one area at the expense of the other thus nullifying the impact of a well established national objective that has brought a high degree of stability to the sometimes volatile industrial relations scene.[4]

Whenever faced with a situation of such nature, this Court has customarily chosen the path which reconciles conflict between national objectives and permits its citizens to receive the benefit of each with a minimum of friction. It is urged to do so in the present case.

1. Arbitration awards are binding under the national labor policy upon all participants in such forum.

This Court for sixteen years has taken a consistent position that final and binding arbitration is the preferred method of settling disputes arising out of the employment relationship where there is a collective bargaining history. The key to the acceptance of this policy is, of course, the "final and binding" nature of the arbitration process.

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[4] Petitioner in his brief expresses concern about protection of the public interest but overlooks the fact that industrial peace is likewise a concern of the public interest. (p. 10)

The necessity for mutuality in the arbitration process was further emphasized in *Boys Markets*, supra, pointing out that employers will be wary of assuming obligations to arbitrate binding on them when no similarly efficacious remedy is available to enforce the concomitant undertaking of the other side.

To carve out a wholesale exception to the carefully and consistently developed national labor policy, as Petitioner urges, is patently unfair to the employer. Currently 69% of the collective bargaining agreements in the country contain very explicit "no discrimination" clauses.[5] some of these clauses are remarkably similar to the requirements of Title VII.[6]

However, employers confronted with the result urged by Petitioner (i.e. if the employer loses in arbitration it is final but if he wins the employee starts over in the courts) will quickly realize that this double exposure can be eliminated by excluding claims of discrimination from arbitration. It is submitted that such a result is both undesirable and unnecessary.

Further, it is fast becoming a familiar pattern for an employee or his designated union representative to raise an otherwise cognizable claim of discrimination under Title VII in the forum of arbitration and then, upon receiving only partial relief repudiate the unfavorable portion of the award and seek to litigate that portion of his claim in the District Courts, a scene which has in

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[5] *Basic Patterns in Union Contracts*, 7th Ed. BNA, February 1971.

[6] The clause in the labor agreement covering Petitioner as listed on p. 23 of the Record of Appendix was as follows: "The Company and the Union agree that there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry. The Company further states and the Union approves that no such discrimination shall be practiced against any applicant for employment."

recent times been before the Sixth Circuit on two occasions. *Spann* v. *Joanna Western Mills*, 446 F.2d 120, 3 FEP Cases 831 (1971) and *Thomas* v. *Carey Mfg. Co.*, 455 F.2d 911, 4 FEP Cases 468 (1972). In both cases the Court of Appeals, on the basis of its holding in *Dewey*, affirmed by this Court, supra, upheld the granting of summary judgment by the District Court dismissing the action. In *Spann* Judge Peck writing the Court's opinion referred to the employee's attempt to have "four separate bites of the apple" (1) arbitration; (2) the Michigan Civil Rights Commission; (3) the EEOC: and (4) the judiciary, characterizing the Plaintiff's effort, as a "successive monogamy of remedies", supra at 446 F.2d 123, 3 FEP cases 833.

The Court is urged to reinforce the position it has taken since *Enterprise* that has resulted in a strengthening of the arbitration process as the primary means for settling employment disputes arising under collective bargaining agreements and to channel such matters away from the arteries of the federal judicial system.

Those Courts of Appeal that have stopped to consider the problem of accomodation have expressed concern, in varying degrees, as to the sanctioning of an obvious unilateral structure permitting an employee to first invoke arbitration and then reject the results, if unfavorable. This concern was perhaps best expressed by the Trial Court below:

> "The vital importance of the Civil Rights Act must not be overlooked but it is the employee who elected arbitration. His was a voluntary choice and he should be bound by it. The Constitution and Title VII demand equality, neither requires preferential treatment of minorities. Chief Justice Berger's opinion in *Griggs* v. *Duke Power Co.* (1971) 401 U.S. 424, 3 FEP Cases 175, can be read in no other way." —— F.S. —— 4 FEP Cases 1209.

Notwithstanding the treatment of this aspect of the case by the Court below, Petitioner offers no response in his brief. Perhaps the reason is that fundamental elements of fairness as well as the national labor policy dictate that there be mutuality of conclusion upon all parties to an arbitration case. Judge Weick, in his opinion for the Sixth Circuit on rehearing in *Dewey*, stated that there appeared to be no good reason why an award of an arbitrator should not be binding upon both parties, the same as a judgment of a Court, supra. This salient comment as to the effect of a judgment leads to the *amicus'* final comment on this point.

This Court must ponder the effect of its holding if an employer has moved to confirm an arbitration award under the U.S. Arbitration Act.[1] Section 13 of the Act provides that the judgment shall be docketed as if it were rendered by the Court in an action. The Section concludes in these terms:

> "The judgment so entered shall have the same force and effect in all respects as, and be subject to all the provisions of law relating to a judgment in an action; and it may be enforced as if it had been rendered in an action in the Court in which it is entered." 9 USC 13

Under the arbitration statute a party to an arbitration award has one year from the date it is rendered to move to confirm it. Once done, the language of the Act clothes such award with "the same force and effect" as a judgment of the Court. Query the result, in a case where the Trial Court is faced with one judgment based upon an arbitration award which finds no claim for discrimination being in conflict with its own opposite judgment, after a trial on the merits?

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[1] 9 USC 9.

In such a circumstance, which the *amicus* concedes is not present here, how is the trial court to view the conflicting judgments? Can the court, unlike the Petitioner here, ignore either judgment with impunity? The *amicus* urges that it is necessary to the preservation of the structure of the arbitration process, absent specific congressional approval, that an employee not be permitted to unilaterally repudiate an arbitration award rendered in a proceeding which he or his legal representative[8] has voluntarily invoked. The purpose of arbitration would be easily thwarted and the national labor policy seriously threatened if awards were held by the Courts to be binding only on employers but not on employees, and the Court is urged to reject such contention.

2. The most desirable method for dealing with claims of discrimination is arbitration where such claims are cognizable under a labor agreement.

The dynamics of the arbitration process have long since established its high desirability as an instrument of industrial peace, contrary to Petitioner's claim. Since the vast majority of labor agreements provide prohibitions against discrimination substantially similar to those provided by Title VII, arbitration provides a ready-made forum for the handling of these claims with a number of advantages over the courts for each of the participants.

From the employee's point of view, as even Petitioner concedes in his brief (p. 25) faster relief, if relief is warranted, is considerably less expensive, since the union provides representation for him, and at the same time is generally considered fair.

From the union's point of view, arbitration of discrimination claims permits it to represent the employees in all of their dealings with the employer, rather than fragmenting the union's representation status.

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[8] Cf. 29 USC 158, et seq.

From the employer's point of view, arbitration is faster,[9] less expensive, and is a method of dispute resolution which is now considered generally acceptable in the business community.

In addition, arbitrators are better qualified to deal with claims of discrimination arising out of the employment relationship than are the courts. Arbitrators deal with questions of industrial practices including discipline and discharge on a day-to-day basis. Such daily contact equips them to readily distinguish between real and purported reasons for discipline and discharge. They are also familiar with the needs and practices of the employing industry and if necessary can make on site inspections. In *Steelworkers* v. *Warrior and Gulf Nav. Co.*, Mr. Justice Douglas compared the competence of the arbitrator and the courts with regard to industrial disputes:

> "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." 363 U.S. at 581-582, 46 LRRM 2419.

The Courts on the other hand are not only ill-suited to deal with these problems, but the tremendous increase in this type of litigation cannot help but exacerbate the growing crisis caused by overburdening case loads.

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[9] This of course can be an extremely critical factor to both the employer and the employee when there is the possibility of back pay with running liability involved.

Petitioner attempts to overcome this natural affinity of the arbitration process for resolving Title VII claims of employment discrimination by attacking it on an institutional basis. Initially, he raises the false specter that labor organizations cannot be trusted to properly represent persons in the bargaining unit because there is a "built in conflict of interest" to any employee claiming discrimination. This generalization overlooks the fact, however, that a labor union has a "duty of fair representation" specifically recognized by this Court, *Vaca* v. *Sipes*, supra, and that the failure to properly represent employees in the grievance and arbitration machinery violates that duty. *Steele* v. *Louisville and Nashville RR*, 323 U.S. 192, 15 LRRM 708 (1944).

Second, Petitioner's claim likens arbitration to a process totally devoid of structure with no safeguards for the rights of participants. Such assertion exhibits not only a lack of familiarity with the institution itself but also with one of the major criticisms leveled at it today. The very charge of lack of safeguards and legal structure raised by Petitioner is refuted by the experts in the field. Robin W. Fleming in an exhaustive analysis of the arbitration process had this comment:

> "The formality criticism is more complicated since it includes a bundle of interchangeable items. The substance of the charge is that the merits of the dispute get lost in arguments over arbitrability, the form of the grievance, technical rules of evidence, the application of precedent, reliance upon transcripts, briefs, etc." [10]

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[10] *The Labor Arbitration Process*, R.W. Fleming, University of Illinois Press (1965) p. 57.

Further, the Court is asked to take judicial notice of the Voluntary Labor Arbitration Rules of the American Arbitration Association which outline a complete procedure framework for an arbitration proceeding.

In summary, Petitioner's institutional attacks on the arbitration process are not borne out by any substantial evidence and are merely the undocumented conclusions of his counsel.[11] One need look no further for final proof of the viability of this process as a sound and effective mechanism for resolving employment discrimination claims arising under the collective bargaining agreements, than the vast body of arbitration awards handed down every year by knowledgeable adjudicators who may indeed be called the unrecognized judges of industrial relations in America.[12]

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[11] For example, his contention that arbitration cannot deal with class problems is inaccurate. In everyday industrial relations parlance they are known as "group grievances."

[12] See e.g. *Tri-City Container Corporation* (Pigors, P. Arb.) 42 LA 1044 (1964) Racial discrimination in administration of job qualification test; *Allen Manufacturing Co.* (Hogan, J. Arb.) 49 LA 199 (1967) Sex discrimination in employer's disqualification of female employees from physically demanding work; *Avco Corporation* (Turkus, B. Arb.) 54 LA 165 (1970) sex discrimination in denial of equal overtime opportunity to females; *Gross Distributing, Inc.* (Allman, W. Arb.) 55 LA 756 (1970) sex discrimination in application of seniority rules; *Community Unit School Dist. 205* (Seitz, P. Arb) 55 LA 895 (1970) sex discrimination in refusal to fill vacancies with qualified female employees; *Memphis Light, Gas and Water Division* (William, R. Arb.) 59 LA 1040 (1972) Racial discrimination in failure to promote qualified black employees to vacant positions; *Albertson's, Inc.* (Eldeman, E. Arb.) 59 LA 1119 (1972) racial discrimination in demoting black employee whose vocational difficulties were attributable to lack of cooperation due to racial prejudice.

B. THE DOCTRINE OF COLLATERAL ESTOPPEL IN THE MODERN FORM OF "POST ARBITRAL AWARD DEFERENCE" IS PROPERLY APPLICABLE TO TITLE VII CLAIMS OF DISCRIMINATION WHICH HAVE PREVIOUSLY BEEN VOLUNTARILY SUBMITTED TO ARBITRATION UNDER A LABOR CONTRACT.

Those who argue that an employee should not be bound by the arbitration award base their argument on two grounds: (1) the employee is asserting two different rights, one contractual and the other statutory; and (2) the arbitrator may not consider the full statutory claim of the employee or may be precluded from doing so by some other section of the agreement.

As has already been shown, the first ground may not exist in a large number of cases where the contractual prohibitions on discrimination are virtually identical to the statutory prohibitions. In these cases there are not two separate rights, but rather one right expressed in two different places.

The second ground may be a valid consideration, but to hold that an arbitration award is not bindng on the employee involved because there is a question as to whether or not he had a fair hearing or his claim received due consideration is to categorically discard a proven and desirable vehicle that offers substantial advantages. Fortunately, such an all or nothing choice as Petitioner repeatedly urges as his primary theme, need not be made. The *amicus*, as in *Dewey*, again submits that the equitable doctrine of collateral estoppel amalgamated to the parameters of the labor arbitration process is peculiarly suited for use by the courts in the situation here.

The general doctrine is not unknown and has been invoked and applied to administrative proceedings under the

Civil Service Act (*Bentley* v. *Teton*, 153 N.W. 2d 495); in the Court of Claims; (*Delatush* v. *United States*, 151 Ct. Cl. 405); and before the Interstate Commerce Commission (*N.Y.S. & W.R. Co.* v. *Central R. Co. of N.J.*, 156 NYS 2d 199).

The *amicus* here urges the application of such doctrine, but under the more modern and recognized label of "post-arbitral award deference"[13] In essence, its position is that while an employee who has invoked the disputes resolution machinery of a labor contract and received an adverse decision cannot be denied his statutory right under Title VII to institute an action in Court, accommodation with the national labor policy requires that he be bound by such decision in the alternative forum under certain circumstances and the District Court should be required to defer, in its deliberations, to the prior decision of the arbitrator on the issues involved in the subsequent litigation.

More traditional considerations beyond the national labor policy dictate such accommodation. Mutuality of obligation and remedy, equitable estoppel, *res judicata*, and fundamental fairness are all doctrines well rooted in Anglo-Saxon jurisprudence. This Court has had occasion in recent years to re-examine the principle of "mutuality of estoppel" in connection with a judgment. In *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, et al., 402 U.S. 327 (1971) a unanimous Court permitted the defendant in a patent infringement suit to raise a plea of estoppel on a judgment rendered against the plaintiff in another action involving a different defendant. Speaking for the Court, Mr. Justice White stated that the trend had been toward sanctioning the lower courts facility "in dealing with questions of when it is appropriate and fair to impose an estoppel against

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[13] *Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955). Cf. *The Developing Labor Law*, Morris, C.J. Ed. pp. 489 et seq.

a party who has already litigated an issue once and lost." Supra at 402 U.S. 349.

The rule urged on the Court here by the *amicus* adheres to this trend by permitting a defendant employer to assert a prior arbitration award as a defense in a concurrent or subsequent Title VII action and then have the District Court examine it at the motion stage of the litigation, to determine if it constitutes an appropriate adjudication of the issues before the Court and requires dismissal of the action. This doctrine would mean substantial progress in the reduction of multiple litigation between common parties over the same dispute.

Central of course to any such rule is that the criteria which the District Court uses in its examination of the award be consistent with recognition that the Petitioner has, in fact, received a proper adjudication.[14]

It is submitted that such inquiry on deferral to a prior arbitration award would be in conformity with Title VII and enhance its effectiveness without undermining the national labor policy on arbitration.

Petitioner unfortunately throughout his brief consistently rejects efforts at accommodation through post arbitral award deference:

> ". . . there are no circumstances under which pursuit of grievance machinery to arbitration should prevent a federal court from reaching the merits of a charge of employment discrimination." (Petitioner's brief p. 13)

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[14] Of course, the point raised earlier in this brief as to the effect of a motion to confirm the award thus making it a judgment of the Court must also be in harmony with such inquiry by the Trial Court.

His woefully inadequate suggestion that arbitration awards should be accorded only evidentiary weight is entirely consistent with such position and, in reality, is merely the ultimate expression of his rejection of the principle of accommodation urged by the *amicus* here.

Petitioner relies upon the legislative history of the 1972 amendments for support of his position. The *amicus* submits that he has overread such history and that the points he offers can actually be urged to substantiate a contrary conclusion. Thus the fact that Section 702(b) of the Act requires the EEOC to give "substantial weight" to final findings and orders of state and local agencies evidences an intent to treat the decisions of other tribunals with a high degree of respect and not in the inferior manner suggested by Petitioner.

Likewise, the fact that Congress rejected efforts of the House to make the Federal Courts the sole and exclusive forum for resolving claims of employment discrimination can be equally cited as authority for the recognition that a variety of tribunals may be resorted to by claimants leaving the question of accommodation to the normal pattern of judicial doctrine. Thus assuming *arguendo* that there are complementary remedies for Title VII claims, it does not automatically follow, as Petitioner contends, that the Courts are deprived of the power to adhere to the traditional doctrine of collateral estoppel. Nothing contained in the legislative history of the Act supports a conclusion that Congress intended to erode the fundamental powers of the judiciary to harmonize dual and desirable legislative objectives in the national interest.[15]

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[15] The Court has frequently cautioned that "it is best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *U.S.* 328 U.S. 61, 69 (1969).

C. APPROPRIATE GUIDELINES SHOULD BE FORMULATED BY THIS COURT REFLECTING ACCOMMODATION OF THE TWO NATIONAL OBJECTIVES.

The Court has the further opportunity to implement the accommodation of the national labor policy on arbitration and the elimination of discrimination in employment opportunities by enunciating guidelines for the benefit of the trial judiciary which will enable them to implement the spirit of the court's action in this case. Accordingly, the *amicus* proposes for the court's consideration the following as the parameters within which the above accommodation can, under a rule of reason, go forward.

First is the matter of the burden of raising the prior arbitration award in the Title VII litigation. It would appear best to require the respondent employer to assume this burden of pleading in the District Court after an arbitration award has issued. Such defense would be pleaded under Federal Rule 8(c). Once done, however, the burden should then shift to the Petitioner as the party attacking the award to document why it should not be accorded the degree of finality generally given such decisions by establishing the absence of the factors listed below.[16]

Once the matter is properly before the Court, as outlined above, deference to the arbitration award should be granted if the following circumstances are present:

1. The Petitioner was fairly and adequately represented in the arbitration.

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[16] This places the burden on an equal plane with the U.S. Arbitration Act. However, unlike a motion to vacate, since a different issue is before the trial court, i.e. accommodation of the award with Petitioner's statutory rights to seek relief under Title VII, the trial court properly should have a broader area of inquiry before determining if it will grant post-arbitral award deference.

2. The Arbitration was conducted in a fair and regular manner.

3. The collective bargaining agreement contained a provision prohibiting discrimination consistent with Title VII.

4. The issue of discrimination otherwise cognizable under Title VII was raised in the arbitration.

5. The arbitrator had the authority under the collective bargaining agreement to rule on the Petitioner's claim he now asserts in the court action.

6. The Arbitrator's decision is not clearly repugnant to the purposes of the Act.

The above criteria are substantially in accord with the decision of the Fifth Circuit in *Rios* v. *Reynolds Metal Company* (C.A. 5) 467 F.2d 54, 5 FEP Cases 1 (1972). Unlike *Rios* however the *amicus* here would place the burden for overcoming the effect of the arbitration award on the party who seeks to avoid it. This would be in accord with the national labor policy giving an element of finality to such decisions and be consistent with other permissible efforts along similar lines. *Steelworkers* v. *Enterprise Wheel & Car Corp., supra.* Placing the burden in this fashion would also be in accord with the Court's action in *Vaca* v. *Sipes, supra* where it held that the employee asserting that his union had breached its duty of fair representation must establish the facts supporting a finding by the Trial Court to avoid the doctrine of exhaustion of contractual remedies required under the *Maddox* rule.

The *amicus* submits that the foregoing principles, if adopted by this Court, will furnish the lower courts with the proper dimension of their inquiry in cases of this kind. Petitioner's statutory rights under the Civil Rights

Act are protected because he can avoid the effect of an arbitration award by establishing the existence of circumstances under which the Court should not grant deference. In addition the adoption of the suggested guidelines in this case will serve as a *caveat* to all parties and arbitrators alike as to the independent statutory rights of an aggrieved person under Title VII and its relationship to the arbitration process. Under those circumstances, it is clear that the national labor policy favoring arbitration clearly dictates substantial legal effect be given to the arbitrator's decision and this court is so urged to hold.

D. THE DECISION BELOW SHOULD BE AFFIRMED ON THE RECORD BEFORE THE COURT.

As has been noted earlier, Petitioner appears before this Court in the face of adverse rulings from every inferior tribunal where he has sought relief. In this sense his case stands virtually apart from every other Court case involving the issue of post-arbitral award deference. An examination of these other Court rulings indicates that some affirmative support for the proferred claim of the plaintiff was found in his "successive monogomy of remedies."

This becomes important in the instant case because Petitioner was obviously unable to convince the officials in the Agency most likely to support him, the EEOC, that he had merit to his position.[17] Unlike in the arbitration,

[17] This alone does not operate to bar him from instituting suit under Title VII *McDonnell Douglas Corp.* v. *Green*, —— U.S. ——, 5 FEP Cases 969 (1973).

he asserts no obstacles that prevented him from a presentation of the full scope of his alleged claim of discrimination before the EEOC. Thus it must be concluded that even when he had every opportunity to present his *entire* case, he fell short of establishing, in the words of the statute, "reasonable cause" to believe that the Respondent Company had in fact discriminated against him because of his race when he was terminated. Accordingly, no useful purpose would be served in the present litigation by prolonging this matter. Petitioner has had sufficient opportunities to make out a case and he has failed to do so. The courts are already overcrowded with litigation of a marginal nature and this Court should indicate that a litigant is not entitled to an unlimited number of opportunities to prevail. In this case Petitioner has reached beyond that limit to which he is reasonably entitled.

The resolution of the issues underlying Petitioner Alexander's claim in this case involve matters that call for a working knowledge of labor relations under a collective bargaining agreement by one familiar with such areas who is in a position to assess the validity of his claims. Most seasoned labor arbitrators have the necessary experience and background to make an informed decision on the contentions regarding disparite job treatment raised by Petitioner in the arbitration case such as: (1) Being a drill press "trainee" he was improperly terminated for poor job performance, i.e. making excessive scrap; (2) Only he, among other employees in the plant, was warned at least three times about such conduct and received a temporary suspension for his conduct; (3) He was unfairly discharged when he failed to improve his performance following the prior disciplinary efforts.

Petitioner argues strenuously that only federal district judges are competent to rule on these contentions. The flaw in this argument is that while the conclusionary as-

pect of his claim may fall within the ambit of a legal context, the underlying factors of such determinations are all basically of a labor relations nature and more peculiarly within the competence of labor arbitrators to answer. *Steelworkers* v. *Warrior & Gulf Navigation Co., supra.* These factors involve *inter alia* questions of fact or interpretations of personnel and industrial relations practices. As such, they lend themselves, quite naturally to consideration through the grievance and arbitration provisions of a collective bargaining agreement. An Arbitrator approaching this case would probably ask himself several questions:

1. Did the employee possess the sufficient ability—mechanical, technical, educational, etc.—to properly handle the job?

2. Did the company have a definitive standard of job performance and was it applied uniformally to all employes, including the grievant?

3. Was there some unrepaired mechanical deficiency in the machine which affected the employee's job performance? If so, had be brought it to the attention of the Company?

4. Were there other employees working on the same or similar job and if so, what was the Company's experience with their job performance?

5. What was the reason that the discharged employee was unable to improve his performance in the face of the Company's application of the generally approved method of "progressive discipline" designed to give him notice of the seriousness of his conduct.

6. Did the employee challenge the earlier discipline given him?

It is clear that even a cursory reading of the above questions, reveals how well suited the arbitration process

is to resolving them for essentially industrial relations areas are at the core of Petitioner's claims.

Although he makes several assertions that in effect the Union did not fully and fairly represent him at the aribtration hearing he offers no objective evidence beyond his own subjective belief for such claim. Petitioner "felt" that the Union was not representing his interests in the grievance process, especially as to his "feeling" that he was discharged because of his race. (Petitioner's Brief, p. 42) The record fails to show whether Petitioner sought relief either at the EEOC or the National Labor Relations Board in view of this concern. Nor did the Petitioner join the Union as a party defendant as might be expected where the claimant alleges lack of proper representation by his union in the grievance and arbitration machinery. *Vaca* v. *Sipes*, supra.

Finally, we reach the bedrock of fundamental equity as applied to this particular case. The Petitioner was not forced to submit his grievance under the labor contract.[18] But once having done so and voluntarily invoked the contractual machinery leading to a determination on his claim by Arbitrator Sears, he should be bound by the result and not permitted to unilaterally repudiate the outcome becasue it was unfavorable. Indeed, the arbitration provisions of the collective bargaining agreement expressly mandate such import. Article 23 Sec. 5 Step 5 provides:

> "The decision of the Arbitrator shall be final and binding upon the Company, the Union, *and any employee or employees.*" (emphasis added) (Record Appendix p. 27)

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[18] On the facts of this case, the Court does not reach a question involving the requirements of exhaustion of contractual remedies as a condition precedent to instituting suit under Title VII.

This provision of the labor contract was negotiated by Petitioner's collective bargaining representative. As such he is the beneficiary of that agreement and having voluntarily set the grievance and arbitration machinery in motion, he cannot now avoid the natural and legal consequences of his own action. This Court has yet to sanction a principle of "selective obligation" by employees under union negotiated agreements, a result inconsistent with the principles of the National Labor Relations Act.[19]

V. CONCLUSION

For the reasons stated above the *amicus* urges the Court to affirm the decision of the Court below.

MILTON A. SMITH
General Counsel

O. F. WENZLER
Labor Relations Counsel
Chamber of Commerce of
the United States
of America
1615 H Street
Washington, D. C.

JAY S. SIEGEL
SIEGEL AND O'CONNOR
1747 Pennsylvania Ave.
Washington, D. C.

Attorneys for the
Amicus Curiae

July 1973

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[19] Cf. *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332, 14 LRRM 501 (1944).

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1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5847

HARRELL ALEXANDER, SR.,
Petitioner,

vs.

GARDNER-DENVER COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN RETAIL FEDERATION and BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN RETAIL FEDERATION

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607
LAWRENCE M. COHEN
STEVEN R. SEMLER
LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602
Attorneys for the American Retail Federation

Of Counsel:
ALAN RAYWID
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D. C. 20006

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN RETAIL FEDERATION

The American Retail Federation respectfully moves for leave to file a brief *amicus curiae*.[1] In support of this motion, the Federation states:

1. The American Retail Federation is an organization composed of seventy-eight national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the Federation represents approximate-

[1] Pursuant to Rule 42 of the Rules of this Court, the Federation requested consents from all parties to the filing of a brief *amicus curiae*. Counsel for Respondent declined to grant such consent.

ly eight hundred thousand retailers with close to six million employees.

2. The issue in this instant case—accommodation of arbitration as a cornerstone of our national labor policy with the need to provide an appropriate forum for claims of alleged employment discrimination—is a matter of significant national concern. Moreover, a substantial number of employers, who are in interstate commerce and subject to Title VII of the Civil Rights Act of 1964, have collective bargaining agreements containing both no-discrimination clauses and arbitration procedures to resolve disputes arising thereunder. The Federation is, therefore, vitally concerned that an appropriate balance be struck between the arbitral process and Title VII. The court below reached precisely that result, and its decision should, therefore, be affirmed.

For the foregoing reasons, the Federation respectfully requests leave to present its views.

Respectfully submitted,

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607
LAWRENCE M. COHEN
STEVEN R. SEMLER
LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602
Attorneys for the American Retail Federation

Of Counsel:
ALAN RAYWID
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D. C. 20006

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No. 72-5847

HARRELL ALEXANDER, SR.,
Petitioner,

VS.

GARDNER-DENVER COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE

This brief *amicus curiae* on behalf of the American Retail Federation is filed contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae.*

INTEREST OF THE AMICUS CURIAE

The interest of the Federation is set forth in its annexed motion for leave to file a brief *amicus curiae.*

SUMMARY OF ARGUMENT

Respondent, unless the decision below is affirmed, will be required to repeatedly defend against a single claim of unfair employment practice before both an arbitrator and a judge. This multiplicity of forums encourages litigation, rather than conciliation, contrary to the intent of Title VII. It also flies in the face of this Court's repeated recognition that arbitration awards, the preferred method of settling industrial disputes, must be final and binding on both parties. The policy advocated here by Petitioner—the employer is always bound by an arbitration award, but the employee is not if he loses—severely undermines the arbitration process. This Court, in adopting guidelines for federal courts to use in determining whether to defer in an employment discrimination case to an arbitration award which previously decided the *same* issue, must accommodate all of the competing interests involved.

ARGUMENT

I. IT IS CONTRARY TO THE PURPOSES OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT TO ENCOURAGE LITIGATION IN A MULTIPLICITY OF FORUMS.

The Civil Rights Act of 1964 places "great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation." *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968) (emphasis added). *Accord: Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970); *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 32 (5th Cir. 1969). Yet, despite the Congressional policy, continual litigation is actually encouraged by the multiplicity of forums now available to a charging party. The instant case is illustrative.

Prior to instituting the present suit, Petitioner filed a complaint with the Colorado Civil Rights Commission; then he lodged an identical action with the Equal Employment Opportunity Commission; and finally he filed the same grievance under his collective bargaining agreement. Each forum found Petitioner's allegations meritless. Nevertheless, Petitioner now argues that he is entitled to this very panoply of possible remedies. Title VII, it is submitted, contemplates no such multiplicity of forums.

Even John De J. Pemberton, Jr., Deputy General Counsel of the Equal Employment Opportunity Commission, has referred to the prevailing duplicity of forums as a "defendant's nightmare." [1] And, as Mr. Pemberton further observed, the problem is exacerbated by the lack of finality accorded any of the decisions which may be adverse to a claimant. It is not surprising, therefore, that there has been a steady retreat from the early *Hutchings* [2] position of permitting unfettered recourse to federal courts to present discrimination claims anew, despite prior unsuccessful prosecution of those same claims in other tribunals. Thus, the *Hutchings* court itself later implicitly repudiated its earlier position and held that, under certain circumstances, an adverse arbitration award precludes further resort to federal court. *Rios* v. *Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972). Similarly, other decisions, in addition to that of the Tenth Circuit in this case, have refused to allow repeated litigation to go unchecked. *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd. by an*

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[1] Address of John De J. Pemberton, Jr., Deputy General Counsel, Equal Employment Opportunity Commission, before the American Bar Assn., Section on Labor Relations Law, August 15, 1972, as reported in Daily Labor Report, August 16, 1972, p. E-3 (B.N.A., Washington, D.C.).

[2] *Hutchings* v. *United States Industries*, 428 F.2d 303 (5th Cir. 1968).

equally divided Court, 402 U.S. 689 (1971); *Spann* v. *Joanna Western Mills*, 446 F.2d 120 (6th Cir. 1971); *Thomas* v. *Philip Carey Mfg. Co.*, 455 F.2d 911 (6th Cir. 1972). This trend, the Federation submits, is one that comports with the Congressional intent. It is also one that is consistent with the disposition of discrimination claims under the National Labor Relations Act. *Speilberg Manufacturing Co.* 112 NLRB 1080 (1955); *Collyer Manufacturing Co.*, 192 NLRB No. 150 (1971). There is no compelling reason for this Court to now mandate a contrary approach.

II. THE NATIONAL LABOR POLICY FAVORS ARBITRATION AS A MEANS OF DECIDING RACIAL DISCRIMINATION CLAIMS.

The decision below, in addition to avoiding multiple litigation, also comports with the national labor policy of encouraging the utilization of arbitration to resolve industrial controversies. This Court has consistently emphasized [3] that arbitration is one of the cornerstones of federal labor policy. The key to arbitration, of course, is the final and binding nature of that process. The Petitioner, however, would erode this principle in the important area of employment discrimination.

There is no basis for now carving out an exception to the policy of according finality to arbitration awards for employment discrimination cases. Such a view would bind one of the parties to the arbitration—the employer—while leaving the grievant free to pursue other remedies if the award should be adverse. The result will likely be a denigration of the arbitral process in such situations

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[3] See, e.g., *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); and *Boys Markets, Inc.* v. *Retails Clerks*, 398 U.S. 253 (1970).

with a concomitant impediment to the cause of alleviating employment discrimination. This position is also anomalous; arbitrators, as this Court recognized in the *Steelworkers Trilogy*, are clearly well-suited to resolve discrimination disputes. For example, in the instant case the critical question is essentially only the familiar arbitration issue of whether Petitioner was terminated for just cause. A controversy of this nature, as the Labor Board observed in *Collyer*, "can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application . . . of a particular provision of [the] statute." 77 LRRM at 1934.[4] Moreover, in such cases, as in every arbitration situation, "it is the arbitrator's construction which was bargained for; . . . and the courts have no business overruling him because their interpretation of a contract is different from his." *Enterprise Corp.*, 363 U.S. at 599. This principle should be applied in the instant case.

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[4] Petitioner attempts to overcome this natural affinity of the arbitration process for resolving Title VII claims of employment discrimination by erroneously attacking it on an institutional basis. He raises, for example, the false spectre that labor organizations cannot be trusted to properly represent persons in this area because there is a "built-in conflict of interest" with any employee claiming discrimination. (Pet. Br. p. 27) This generalization overlooks the fact that a labor union has a duty of fair representation specifically recognized by this Court, *Vaca* v. *Sipes*, 386 U.S. 171 (1967), and that the failure to properly represent employees in the grievance-arbitration procedure violates that duty. *Steele* v. *Louisville and Nashville R.R.*, 323 U.S. 192.

III. THE FEDERAL COURTS SHOULD DEFER IN TITLE VII CASES TO PROCEDURALLY FAIR ARBITRATION AWARDS WHICH HAVE PREVIOUSLY DECIDED THE SAME ISSUES.

An appropriate accommodation, seeking to both avoid multiple litigation in Title VII cases and accord proper respect for the arbitration process, requires that the federal courts defer to arbitration awards in appropriate circumstances. There should be no blanket rule of non-deferral as Petitioner proposes.

The National Labor Relations Board has struck such a balance in confronting a similar need to accommodate the National Labor Relations Act to the arbitration process. The result is that the Board will defer to an arbitrator's award which resolves the dispute where the proceedings are fair and regular, the issue is properly before the arbitrator, and the decision is not repugnant to the policies of Labor Act.[8] A similar result should prevail as to employment discrimination cases. Where, as here, the award meets these criteria, it should be considered binding on all parties. This was the decision of the court below. It should be affirmed by this Court.

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[8] See *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955); *Collyer Manufacturing Co.*, 192 NLRB No. 150 (1971). *Cf. Rios v. Reynolds Metals Company*, 467 F.2d 54 (1972), in which the Fifth Circuit recently proposed a similar set of guidelines for purposes of achieving judicial deference to arbitration awards in Title VII cases.

CONCLUSION

For the reasons stated above, as well as those presented by the Respondent, the Federation urges the Court to affirm the decision of the court below.

Respectfully submitted,

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

LAWRENCE M. COHEN
STEVEN R. SEMLER
LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

Attorneys for the American Retail Federation

Of Counsel:

ALAN RAYWID
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D. C. 20006

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-5847

HARRELL ALEXANDER, SR., PETITIONER

v.

GARDNER-DENVER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the district court (App. 33-43) is reported at 346 F. Supp. 1012. The opinion of the court of appeals (App. 45-47) is reported at 466 F. 2d 1209.

JURISDICTION

The judgment of the court of appeals (App. 48) was entered on August 11, 1972. On November 4, 1972, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including December 8, 1972, and the petition was filed on the latter date. The petition was granted on February 20, 1973. 410 U.S. 925. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, by invoking the grievance-arbitration procedures of a collective-bargaining agreement which are pursued to termination by his union, an employee waives his right under Title VII of the Civil Rights Act of 1964 to bring suit in federal district court for employment discrimination.

STATUTES INVOLVED

Section 703 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer * * * to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

Section 706 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–5, provides in pertinent part:

> (e) If within thirty days after a charge [of unlawful employment practice] is filed with the Commission * * * the Commission has been unable to obtain voluntary compliance * * *, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the unlawful employment practice. * * *

(f) Each United States district court * * * shall have jurisdiction of actions brought under this subchapter * * *.

(g) If the court finds that the respondent has intentionally engaged in * * * an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate * * *.

INTEREST OF THE UNITED STATES

The decision in this case is likely to have a significant impact upon enforcement of federal rights under Title VII of the Civil Rights Act of 1964. In that Act Congress has entrusted the Equal Employment Opportunity Commission and the Attorney General with important responsibilities for eliminating religious, racial, ethnic, or sexual discrimination in employment. But Title VII also strongly relies on private court actions as a means of enforcing statutory rights against discriminatory employment practices. At the same time, federal labor policy favors settlement of disputes arising under collective bargaining agreements through the grievance and arbitration procedures provided for in such agreements. The decision of the court of appeals, which in effect requires an employee to choose between grievance-arbitration and suit under Title VII, interferes with both of these federal statutory policies. The United States believes that the policies are complementary and that an election of forums, which necessarily entails also an election of rights, should not be required.

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STATEMENT

In May 1966 petitioner, a black man, was hired by respondent to do maintenance work. In June 1968 he was promoted to a position as a trainee drill operator. He was discharged from employment in September 1969. Respondent informed petitioner at that time that he was being discharged for producing too many defective or unusable parts that had to be scrapped (App. 19–20).

Petitioner protested his discharge by filing a grievance under the collective bargaining agreement between respondent and United Steelworkers of America, Local Union No. 3029, of which petitioner was a member (App. 11, 20). Petitioner's grievance did not allege that his discharge was racially motivated, only that it was unjust (App. 32). Under the collective bargaining agreement, respondent had retained "the right to hire, suspend or discharge for proper cause" (App. 23) but had agreed with the union "that there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry" (*ibid.*).

Petitioner's grievance was presented by the union through a multistep grievance procedure. Apparently the issue of racial discrimination was first raised in the final pre-arbitration step of the grievance procedure (App. 12–13). All of petitioner's claims were rejected by respondent and the grievance proceeded to arbitration (App. 20). Prior to arbitration, however, petitioner filed a parallel charge of racial discrimination with the Colorado Civil Rights Commission, which referred the complaint to the Equal Em-

ployment Opportunity Commission on November 5, 1969 (App. 46).

At the arbitration hearing, held on November 20, 1969, the union did not press the issue of racial discrimination (App. 13–14). The only mention made by the union of any kind of discrimination was the bare recital of the text of a letter to the union by petitioner, which stated that "I am knowledgeable that in the same plant others have scrapped an equal amount and sometimes in excess, but by all logical reasoning I * * * have been the target of preferential discriminatory treatment" (App. 30). The union representative did testify, however, that respondent's normal practice was to transfer unsatisfactory trainee drill operators back to their former positions (App. 22). Petitioner, who believed that the union was not adequately representing him with respect to his claim of racial discrimination (App. 14), informed the arbitrator that he had filed a claim with the Colorado Commission because he "could not rely on the union" (*ibid.*).

On December 30, 1969, the arbitrator issued his decision, finding that petitioner had been "discharged for just cause" (App. 22). The arbitrator's five-page opinion did not refer to the question of racial discrimination. The arbitrator stated that the union had failed to produce evidence of a practice of transferring rather than discharging unsatisfactory drill operators, but he referred to that issue only in relation to the general propriety or fairness of petitioner's discharge (see *ibid.*).

On July 25, 1970, the Equal Employment Opportunity Commission determined that there was not rea-

sonable cause to believe that a violation of the Act had occurred (App. 33). The Commission thereafter notified petitioner of his right under Title VII of the Civil Rights Act of 1964 to institute a private action against respondent in federal district court (*ibid.*). Petitioner then timely filed this action in the United States District Court for the District of Colorado, alleging that his discharge resulted from a racially discriminatory employment practice made unlawful by the Act.

The district court found that petitioner's claim of racial discrimination had been submitted to the arbitrator. The court then held that petitioner, having elected the arbitration remedy, had no right to sue under the Act. The court acknowledged the existence of a conflict of authorities on this issue but chose to rely on *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (C.A. 6), affirmed by an equally divided court, 402 U.S. 689. The court of appeals affirmed *per curiam* on the basis of the district court's opinion.

SUMMARY OF ARGUMENT

A

Congress has placed the final responsibility for enforcement of Title VII guarantees upon the federal courts. This Court has in prior cases recognized the importance of judicial enforcement of Title VII by upholding the right of individual access to the courts. Petitioner here satisfied all the statutory requisites for bringing a civil action; there is no statutory basis for the dismissal of his action by the courts below.

B

In dismissing petitioner's action, the courts below purported to rely upon the national labor policy favoring arbitration as a method of settling labor disputes. However, that policy makes arbitration the exclusive means only of settling disputes that arise out of a collective bargaining agreement. This Court has expressly held that the arbitral forum does not displace the courts in the adjudication of statutory claims. Contract rights are to be vindicated in the arbitral forum, statutory rights in the courts. And the right asserted by petitioner is peculiarly statutory in nature, existing independently of the collective bargaining agreement.

Moreover, arbitration is an inadequate forum for the vindication of the important civil rights guaranteed by Title VII. The role of the arbitrator is merely to interpret and apply the terms of the contract; in doing so he rarely relies upon public law concepts, and he has no authority to decide purely statutory matters. Moreover, the arbitrator, who is typically not trained in the law, has no special competence or experience in the adjudication of statutory questions. The employee's claim of discrimination may not be adequately presented by his union. And the grievance-arbitration process does not ensure careful, accurate fact-finding of a kind necessary for the proper determination of statutory claims.

The national labor and civil rights policies are therefore best accommodated by separate enforcement of contractual and statutory rights. A requirement that an

aggrieved employee must elect between the arbitral and judicial forums would mean that, as to any broad class of employees, neither contractual nor statutory rights would be fully vindicated. Both rights should be given full protection. Arbitration should be available for expeditious consideration of contractual claims of discrimination and thus to put an end to the dispute between the union and employer, but the employee should be free to pursue his statutory claims independently in the courts. This approach is consistent with the general statutory scheme, which provides multiple forums for the consideration of discrimination claims, and is necessary to the full effectuation of the congressional guarantee against employment discrimination.

C

The courts, in hearing Title VII claims, should not defer to arbitral findings or decisions with respect to contract claims. The factors that render arbitration an inadequate forum for the adjudication of statutory rights also make inappropriate any judicial deference to the arbitrator.

But even assuming *arguendo* the desirability of a policy of partial deference, there is no basis for deference to the arbitral decision in this case. The claim of discrimination, and the important facts relating to that claim, were not adequately presented to the arbitrator. The arbitrator did not purport to decide the issue of discrimination or to find any of the facts that would have been necessary for such a decision. His determination that respondent had just cause to dismiss petitioner does not resolve the question

whether under the circumstances it was racially discriminatory to discharge, rather than demote, petitioner.

ARGUMENT

AN EMPLOYEE DOES NOT WAIVE HIS RIGHT UNDER TITLE VII OF THE CIVIL RIGHTS ACT TO BRING SUIT IN FEDERAL DISTRICT COURT FOR EMPLOYMENT DISCRIMINATION MERELY BY HAVING HIS UNION PURSUE TO TERMINATION THE GRIEVANCE-ARBITRATION PROCEDURE UNDER THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE UNION AND THE EMPLOYER

A. THE FEDERAL COURTS ARE THE FORUM ESTABLISHED BY CONGRESS FOR DETERMINING THE RIGHTS CONFERRED BY TITLE VII

1. The broad goal of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, is to eliminate discrimination in employment because of race, color, religion, sex, or national origin. Congress hoped that this comprehensive goal would be achieved primarily through conciliation and persuasion. To that end it created the Equal Employment Opportunity Commission and established a procedure under Title VII whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have the opportunity to conciliate a dispute before an individual was permitted to sue. Congress has vested the Commission with authority to investigate an individual charge of discrimination, to attempt to achieve voluntary compliance with the requirements of Title VII, and to bring a civil action against the employer or union named in the charge. 42 U.S.C. (1970 ed., Supp. II) 2000e–5(f). But the Commission itself has no direct powers of enforcement; it has no authority to impose administrative sanctions.

Congress placed the final responsibility for enforcement of Title VII guarantees in the federal courts. They are authorized under the Act to grant injunctive relief, and to order affirmative action if they find that the Act has been violated. 42 U.S.C. (1970 ed., Supp. II) 2000e–5(g). The courts are empowered to grant such relief whether or not the Commission has made a finding of reasonable cause to believe that the Act has been violated. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798–799. Similarly, findings and orders made by state agencies do not bar an individual from pursuing his claim before the Commission and in the federal courts. See 42 U.S.C. (1970 ed., Supp. II) 2000e–5 (b); *Cooper* v. *Philip Morris, Inc.*, 464 F. 2d 9 (C.A. 6).

It is thus obvious that "[t]o the federal courts alone is assigned the power to enforce compliance with [Title VII]." *Hutchings* v. *United States Industries, Inc.*, 428 F. 2d 303, 310 (C.A. 5).[1] Indeed, this Court has recog-

[1] This conclusion is further confirmed by the legislative history of earlier versions of Title VII, which would have given the Commission more power. The original Senate version provided for a quasi-judicial board with authority to receive unresolved complaints of employment discrimination from an Administrator within the Department of Labor, and to issue broad remedial orders. See *Comparative Analysis of Title VII of H.R. 7152 as Passed by the House with S. 1937, as Reported*, 110 Cong. Rec. 12596–12597. Moreover, the statute as originally enacted did not authorize the Commission to institute civil actions, except to compel compliance with orders rendered in private suits. That power was conferred on the Commission by the Equal Employment Opportunity Act of 1972, Pub. L. 92–261, 86 Stat. 103. But in authorizing the Commission to bring suit to enforce Title VII, Congress expressly preserved the private right of action. 42 U.S.C. (1970 ed., Supp. II) 2000e–5(f), (1).

nized the importance of judicial enforcement of Title VII guarantees in upholding the right of individual access to the courts against allegations of procedural obstacles. See *McDonnell Douglas Corp.* v. *Green, supra; Love* v. *Pullman Co.*, 404 U.S. 522.

2. In keeping with the statutory plan, petitioner in this suit sought judicial enforcement of his Title VII rights. The courts below held that petitioner, by having had his grievance under the no-discrimination clause of his collective bargaining agreement pursued to final arbitration, had waived his right to sue his employer for unlawful racial discrimination under Title VII. They cited no statutory authority for this result, and there is none.

Plaintiff had filed timely charges of racial discrimination with the Colorado Civil Rights Commission, which referred the complaint to the Equal Employment Opportunity Commission.[2] After investigation, the Equal Employment Opportunity Commission determined that there was not reasonable cause to believe that the Act had been violated; it thereupon notified petitioner of his right to bring a private suit against his employer.[3] There is no statutory provision for waiver of that right, and, as we have noted, this

[2] Section 706(b), 42 U.S.C. 2000e-5(b), required that a charge of unlawful employment practice must first be submitted to a state or local agency. The same requirement is now set forth at 42 U.S.C. (1970 ed., Supp. II) 2000e-5(c).

[3] Section 706(e), 42 U.S.C. 2000e-5(e), permitted suit by an individual upon the Commission's failure, within a certain time, to achieve voluntary compliance with the requirements of Title VII. Such suits are now permitted under 42 U.S.C. (1970 ed., Supp. II) 2000e-5(f)(1).

Court in *McDonnell Douglas Corp.* v. *Green, supra,* expressly held that a "no reasonable cause" finding by the Commission does not bar a private suit based on the same complaint. There is also no statutory provision for withdrawal of a federal district court's jurisdiction over Title VII suits on account of prior arbitration of similar contractual issues; the Act grants the federal district courts jurisdiction over such suits without restriction or qualification, aside from that of timeliness (see 42 U.S.C. 2000e–5(f); 42 U.S.C. (1970 ed., Supp. II) 2000e–5(f)(3)), and petitioner's suit was timely filed.

B. TITLE VII AND COLLECTIVE BARGAINING AGREEMENTS PROVIDE LEGALLY DISTINCT RIGHTS THAT ARE PROPERLY ENFORCEABLE IN DIFFERENT FORUMS

1. Notwithstanding the absence of any statutory authority for doing so, the courts below held that the pursuit of petitioner's claim under the no-discrimination clause of his collective bargaining agreement to final arbitration foreclosed the possibility of judicial consideration of his Title VII claim. In so holding, the courts below relied on what they perceived to be the dictates of national labor policy, as exemplified by this Court's decisions in *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, and the three *Steelworkers* cases (*Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Co.,* 363 U.S. 574; *Steelworkers* v. *Enterprise Corp.,* 363 U.S. 593). See also *Boys Markets, Inc.* v. *Clerks Union,* 398 U.S. 235. The Court in those cases held that both employers and unions may be compelled to arbitrate a contract

grievance in accordance with the terms of the governing collective agreement and emphasized that "so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Steelworkers* v. *Enterprise Corp., supra,* 363 U.S. at 599. And in *Republic Steel* v. *Maddox,* 379 U.S. 650, the Court held that contract grievance procedures must be exhausted before contract claims may be submitted to the courts.

It is clear, however, that the holdings in these cases fall far short of requiring a court to accept an arbitrator's denial of a contractual claim as also dispositive of a distinct statutory claim. The judgments and opinions in those cases stand only for the primacy of arbitration as a means of resolving contractual issues; they do not call into question the independent responsibility of the judiciary to resolve noncontractual, statutory issues. Moreover, this Court has explicitly indicated that the arbitral forum does not displace the courts in the adjudication of peculiarly statutory claims. For example, in *McKinney* v. *Missouri-Kansas-Texas R. Co.,* 357 U.S. 265, the Court held that an employee returning to employment after his term of military service could sue to enforce his seniority rights under the Universal Military Training and Service Act, without having pursued the grievance-arbitration remedy under his collective bargaining agreement; the Court's reasoning suggested (357 U.S. at 270) that even if the plaintiff had first asserted his contractual seniority rights through arbitration, he would nevertheless have been entitled to bring

suit under the statute. Similarly, in *U.S. Bulk Carriers* v. *Arguelles*, 400 U.S. 351, the Court held that the federal district courts have jurisdiction over a seaman's statutory suits for wages, even when the seaman has ignored an available arbitral remedy. In distinguishing between *Arguelles* and *Maddox*, Mr. Justice Harlan emphasized that where the substantive rights being asserted "derive solely from the contract," strong policy concerns support the exclusivity of the arbitral forum, but that where a right is claimed under a federal statute, "the presumption of comprehensiveness of the arbitral remedy is * * * rebutted" and remedies prescribed by statute for vindication of the statutory right remain available. *U.S. Bulk Carriers* v. *Arguelles, supra*, 400 U.S. at 361–362 (concurring opinion).

In short, contract rights are to be vindicated in the arbitral forum, statutory rights in the courts. This principle applies *a fortiori* where, as here, the statute confers upon individuals a right that is wholly independent of the collective bargaining agreement—a right whose substance derives entirely from the statute itself (and from the regulations adopted under it by the agency responsible for its enforcement).[4] Thus, in

[4] Because Title VII rights are in this sense self-contained, the present case does not present the difficulty that divided the Court in *Arguelles*. In that case, the claimant's statutory and contractual rights were interdependent—whether (and in what measure) he was entitled to the statutory remedy depended "entirely on interpretation and application of the bargaining agreement." *Arguelles, supra*, 400 U.S. at 371 (dissenting opinion of Mr. Justice White). By contrast, Title VII rights apply equally and in the same measure irrespective of whether a col-

our view, a fundamental error committed by the courts below was in assimilating petitioner's contractual and statutory claims, without giving due recognition to the fact that the rights created by Title VII are legally distinct from those established by contract. Since the rights are separate, an individual asserting violations of both should be entitled to bring each claim before the separate forum which is uniquely authorized to interpret and enforce it.

2. There are significant differences between the processes of arbitration under a collective bargaining agreement and litigation under Title VII that highlight the importance of recognizing that the separate rights established by the contract and the statute are appropriately enforceable in separate forums.

The role of the arbitrator is to interpret and apply the contract. This Court emphasized the restricted scope of the arbitral inquiry in *Steelworkers* v. *Enterprise Corp.*, *supra*, 363 U.S. at 597:

> * * * [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it

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lective bargaining agreement exists or whether that agreement, if it does exist, contains a no-discrimination clause. Moreover, in further contrast to the statute involved in *Arguelles*, Title VII was enacted long after use of arbitration under collective agreements had become widespread, and yet Congress specifically provided for judicial enforcement of Title VII rights. In this second respect the present case is more similar to *McKinney*, *supra* (see 357 U.S. at 268), in which the Court was unanimous on this issue, than it is to *Arguelles*.

draws its essence from the collective bargaining agreement.

The narrow responsibility conferred on the arbitrator does not include investigation into and vindication of statutory rights. See Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. Chi. L. Rev. 30, 32–35 (1971). As a recent commentator has observed (Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. Pa. L. Rev. 40, 47–49 (1969)):

> Even where there is a no-discrimination clause prohibiting discrimination on the basis of race—and even where the clause has been negotiated subsequent to the passage of civil rights legislation—arbitrators are generally reluctant to rely upon public law concepts in their opinions and awards. The primary reason for this attitude is the well-accepted notion that the arbitrator is a creature of the parties and is commissioned to interpret their wishes. * * * * * * Ordinarily, * * * the parties do not intend arbitrators to function as a mini-Equal Employment Opportunity Commission. * * *

Moreover, arbitrators are without special competence or experience in the interpretation and application of statutory and constitutional rights. See *U.S. Bulk Carriers* v. *Arguelles, supra.* See, also, Platt, *The Relationship Between Arbitration and Title VII of the Civil Rights Act of 1964*, 3 Ga. L. Rev. 398 (1969). A substantial proportion of practicing labor arbitrators are not lawyers. See Note, *The NLRB and Deference to Arbitration*, 77 Yale L.J. 1191, 1194, n. 28 (1968). The arbitrator's expertise is in the "industrial common law—the practices of the industry and

the shop." *Steelworkers* v. *Warrior & Gulf Co., supra,* 363 U.S. at 581–582. Such expertise does not guarantee effectuation of the underlying purposes of Title VII:

> Few arbitrators possess experience in dealing with problems in the civil rights area. Such problems, particularly those arising under Title VII, are often quite difficult * * *. * * * [E]ntrusting the protection of the rights created by Title VII to the relatively unreviewable discretion of an arbitrator would seem to involve a substantial curtailment of the protection provided by Congress. [Hebert & Reischel, *Title VII and the Multiple Approaches to Eliminating Employemnt Discrimination,* 46 N.Y.U. L. Rev. 449, 469 (1971); footnotes omitted.]

This problem is compounded by the very limited scope of judicial review of arbitration awards. See, *e.g.,* Jalet, *Judicial Review of Arbitration: The Judicial Attitude,* 45 Cornell L.Q. 519, 532–542 (1960); Note, *Judicial Review of Arbitration Awards on the Merits,* 63 Harv. L. Rev. 681 (1950). The limited scope of judicial review of arbitration awards is appropriate, at least in part, because arbitrators merely interpret and apply the disparate provisions of privately-adopted agreements. But Congress has, in Title VII, created nation-wide rights and provided methods for their enforcement intended to assure that they will be judicially defined and uniformly applied. The availability of uniform judicial enforcement of Title VII rights thus serves an important public interest in assuring that the decisions in Title VII cases will affect the entire class of persons who are the victims of discrimination and not merely the parties to a contract.

There is also a serious risk that an employee asserting primarily statutory claims may be inadequately represented in the grievance-arbitration process. In contrast to Title VII's emphasis upon the individual's right of access to the courts, collective bargaining agreements place the responsibility for the extent and manner of processing a grievance on the union, not the individual aggrieved. See *Vaca* v. *Sipes,* 386 U.S. 171; *Republic Steel Co.* v. *Maddox, supra.* See, also, Cox, *Rights Under a Labor Agreement,* 69 Harv. L. Rev. 601 (1956). Ordinarily the employee will be represented by a union officer with no legal training. See Lev & Fishman, *Suggestions to Management: Arbitration* v. *The Labor Board,* 10 B.C. Ind. & Com. L. Rev. 763, 768 (1969). Moreover, in some instances, at least, the union may have little interest in pressing claims of racial discrimination. That may have been true in this very case; certainly petitioner thought that the union tried to "water * * * down" his claim of discrimination (App. 14). Inadequate presentation of such claims may be endemic under a system of collective bargaining: "[t]he collective bargaining process is premised on *majority* rule, whereas Title VII sets forth certain statutory protections for the *individual* who is a member of a proscribed *minority.*" Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration under Title VII,* 69 Mich. L. Rev. 599, 648 (1971) (emphasis in the original). See, also, Gould, *supra,* 118 U. Pa. L. Rev. at 49. And it is not without significance that Congress found it necessary to afford the protections of Title VII against unions as well as employers, and that much of the significant

litigation under the Act has been directed against union defendants.

Furthermore, the grievance-arbitration process is not designed to ensure the kind of careful fact-finding appropriate where important civil rights are at issue. Racial discrimination is rarely practiced openly and therefore must frequently be proved by detailed comparison of the treatment of the class protected by Title VII with that afforded other individuals. Extensive discovery may be essential, yet discovery in arbitration is limited and compulsory process is probably not available.[8] In arbitration proceedings witnesses do not testify under oath and there is a lack of skilled cross-examination (and frequently no cross-examination at all). See Elkouri & Elkouri, *How Arbitration Works* 155–156 (1960); see generally Fleming, *The Labor Arbitration Process* (1965). The process is basically an informal one in which "[a]rbitrators * * * need not give their reasons for their results [and] the record of their proceedings is not as complete as it is in a court trial * * *." *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203. This is not the method prescribed by Congress for the adjudication of Title VII rights.

3. Separate enforcement of Title VII and collective bargaining rights properly accommodates congressional policies favoring both private resolution of employment disputes and full protection of the individ-

[8] See generally Smith, Merrifield & Rothchild, *Collective Bargaining and Labor Arbitration* 217–218 (1970). The extent of the discovery procedures presently afforded parties to labor arbitration proceedings is subject to debate. Compare Note, *Developments in the Law-Discovery*, 74 Harv. L. Rev. 940, 943 (1961) with Jones, *The Accretion of Federal Power in Labor Arbitration—The Example of Arbitral Discovery*, 116 U. Pa. L. Rev. 830, 877–885 (1968).

ual against discrimination. By contrast, the approach adopted by the court below would undermine both national labor policy, favoring arbitration of contract disputes, and the policy of the civil rights laws, which provide for adjudication of statutory claims.

If employees were required to elect between the arbitral and judicial forum, as the decision below would force them to do, individuals who believe that their contractual remedies are inadequate or that surer relief may be obtained under Title VII would be likely to bypass the grievance procedure, while the speed and lesser expense of the arbitral remedy might prompt others to forego judicial enforcement of their statutory rights. Such a haphazard method of enforcement would only ensure that, as to any broad class of employees, neither contract rights nor statutory rights would be fully vindicated: valid contract claims would in some instances be suppressed in the interest of statutory adjudication, whereas in other cases legitimate Title VII claims would be sacrificed in order to obtain prompt settlement of a contract dispute. Yet there is no reason why contract rights and statutory rights should not both be given full protection, by allowing an employee's claim to be resolved in the appropriate forum with respect to each of his distinct rights.

Harmonious resolution of labor disputes is of course promoted by encouraging employees to invoke grievance-arbitration procedures; the availability of arbitration as a prompt remedy for such disputes lessens the likelihood of labor strife. Arbitration should therefore be available for expeditious consideration of contractual claims of discrimination. "This comports not only with the national labor policy favor-

ing arbitration as a means for the final adjustment of labor disputes * * * but also with the specific enforcement policy of Title VII that discrimination is better curtailed through voluntary compliance with the Act than through court orders." *Hutchings* v. *United States Industries, Inc., supra,* 428 F. 2d at 313. The unrestricted availability of arbitration, and its utilization on behalf of employees raising claims of discrimination, tends to strengthen the process of collective bargaining by buttressing the allegiance of minority group members to their labor organizations. Cf. *United Packinghouse Workers* v. *National Labor Relations Board,* 416 F. 2d 1126, 1135–1136 (C.A. D.C.), certiorari denied, 396 U.S. 903.

At the same time, allowing the employee to pursue his statutory claims independently in the courts ensures fuller effectuation of the congressional guarantee against employment discrimination and thus also serves an important public interest (see p. 17, *supra*). Allowing resort to both appropriate forums would be similar to the procedure under the National Labor Relations Act, permitting some issues to be presented both to the arbitrator and to the National Labor Relations Board:

> By allowing the dispute to go to arbitration * * * those conciliatory measures which Congress deemed vital to "industrial peace" * * * and which may be dispositive of the entire dispute, are encouraged. The superior authority of the Board may be invoked at any time. Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area. [*Carey* v. *Westinghouse Corp.,* 375 U.S. 261, 272.]

Resort to both appropriate forums was foreclosed by the courts below primarily on the ground that the employee, but not the employer, would thereby be enabled to relitigate the arbitral award. But this falsely characterizes the nature of the employee's lawsuit. In pursuing his statutory claim in court, an employee is not challenging the arbitrator's interpretation of the collective bargaining agreement; he is asserting that he has different, and additional, statutory rights that the arbitrator did not—indeed, probably could not—vindicate. The reason why the employer, unlike his employee, cannot subsequently proceed in the courts is simply that Title VII does not grant employers substantive rights against their employees; an employer cannot as a matter of law be the victim of employment discrimination by his employee. See Comment, *Dewey* v. *Reynolds Metals Co.: Labor Arbitration and Title VII*, 119 U. Pa. L. Rev. 684, 691–692 (1971); Meltzer, *supra*, 39 U. Chi. L. Rev. at 38–39.

The district court below also was of the view that the availability of a Title VII suit after arbitration "would sound the death knell for arbitration clauses in labor contracts" (App. 43). Such a result seems highly unlikely. As this Court has repeatedly recognized, an arbitration agreement is the *quid pro quo* for a no-strike clause. See, *e.g.*, *Boys Markets, Inc.* v. *Clerks Union*, *supra*; *Textile Workers Union* v. *Lincoln Mills*, *supra*. An employer thus has ample incentive to agree to an arbitration clause, regardless of the possibility that it may not prevent litigation about employment discrimination.* Indeed, even in an employment

* The experience under the National Labor Relations Act also indicates that occasional subsequent litigation does not deter

discrimination case, an arbitrator's award in favor of the employer ends the latter's dispute with the union (subject, of course, to limited judicial review) and thus provides valuable assurance against disruption of the employer's activities by labor-management strife, even though the employer remains subject to suit by an employee under Title VII on a similar claim. This is another important reason why such a suit does not amount to a relitigation of the arbitrator's award.

Furthermore, Congress in enacting Title VII evidently concluded that the need to vindicate rights against employment discrimination outweighs the desirability of protecting employers against similar claims in more than one forum. Congress recognized that several different forums would have jurisdiction over employment discrimination disputes. See, *e.g.*, 42 U.S.C. (1970 ed., Supp. II) 2000e–5(b) (state agencies); 42 U.S.C. 2000e–15 (President's Committee on Equal Employment Opportunity); 110 Cong. Rec. 7207 (National Labor Relations Board). The rights enforced in each forum were considered to be independent of each other. Senator Clark, a leading sponsor of the bill, explained (110 Cong. Rec. 7207):

> [T]itle VIII * * * does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. If a given action

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parties from entering into arbitration clauses. At least prior to its decision in *Collyer Insulated Wire*, 192 NLRB 837 (1971), the board deferred to arbitral decisions in only a small percentage of the arbitration cases it reviewed (see Note, *The NLRB and Deferences to Arbitration*, *supra*, 77 Yale L.J. at 1204–1208), yet a representative sampling of collective bargaining agreements showed that 94 percent contained arbitration clauses. Bureau of National Affairs, *Labor Relations Yearbook: 1970*, 38.

should violate both title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction. Accordingly, three courts of appeals have held that Title VII actions are not barred by prior adverse determinations under other federal laws with respect to the same practices. *Tipler* v. *E.I. duPont de Nemours and Co.*, 443 F. 2d 125 (C.A. 6); *Taylor* v. *Armco Steel Corp.*, 429 F. 2d 498 (C.A. 5); *Norman* v. *Missouri Pacific R.R.*, 414 F. 2d 73 (C.A. 8). There is, if anything, even less reason why employers and unions (against both of whom Title VII's anti-discrimination provisions are directed) should, by private agreement, be able to deprive individuals of the right of access to the courts conferred on them by Congress.

In sum, while Congress was silent on the relationship of arbitration and Title VII rights, the multiple forum approach which it adopted with respect to other means of securing rights against discrimination strongly suggests that arbitration is merely an additional means by which relief from discrimination may be sought under relevant provisions of the collective agreement, without depriving individuals of their statutory right to a judicial determination of their Title VII rights. Both federal labor policy and federal civil rights policy can most effectively be served by allowing "plaintiffs to utilize dual or parallel prosecution both in court and through arbitration so long as election of remedy was made after adjudication so as to preclude duplicate relief which would result in an unjust enrichment." *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 715 (C.A. 7). Accord: *Hutchings* v.

United States Industries, Inc., 428 F. 2d 303 (C.A. 5); *Oubichon* v. *North American Rockwell Corp.*, 482 F. 2d 569 (C.A. 9).[1] Indeed, this is the only approach that is fully consistent with the intention of Congress to preserve all available rights against discrimination in employment.

C. JUDICIAL DEFERENCE TO ARBITRAL DECISIONS IS INAPPROPRIATE IN TITLE VII CASES, AND WOULD BE ESPECIALLY UNWARRANTED IN THE CIRCUMSTANCES HERE

For the reasons discussed above, we believe that an employee asserting Title VII rights is entitled to have his claims adjudicated by a court notwithstanding any prior exhaustion of remedies available under the pertinent collective bargaining agreement. The same reasons support the conclusion that in hearing such claims, the courts should not defer to arbitral findings or decisions, which relate only to matters of contract and not to statutory rights. However, even if a policy of limited judicial deference to the arbitral decision is adopted, there is no basis in this case for such deference.

We discuss this issue as a question of judicial "deference" because it is clear that the principles of *res judicata* and collateral estoppel do not bar litigation, subsequent to the arbitration award, of all questions pertaining to an employee's statutory claims. In the first place, the doctrines of *res judicata* and collateral estoppel do not appear to be technically applicable at all. At common law these doctrines applied

[1] These decisions, of course, conflict with the decision below and with *Dewey* v. *Reynolds Metals Co.*, *supra*.

only with respect to prior judgments in judicial proceedings. Whether decisions of an administrative tribunal "are binding in subsequent controversies depends upon the character of the tribunal and the nature of its procedure and the construction of the statute creating the tribunal and conferring powers upon it." American Law Institute, *Restatement of Judgments*, § 2 (1942). The arbitrator, however, is not a public official or tribunal but is essentially a private agent of the parties to the contract. His award is given effect by the courts basically because it thus becomes a part of the parties' contractual agreement, rather than as a matter of *res judicata* or collateral estoppel.

In any event, the judgment of any tribunal of special and limited jurisdiction is conclusive only as to questions within its competence. American Law Institute, *Restatement of Judgments*, § 71. The effect on subsequent litigation of an arbitrator's award is therefore restricted to contract issues. This is true not only of the arbitrator's legal determinations but of his findings of fact as well. *Id.*, § 71, comment *d* and illustration 1.[8]

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[8] Moreover, while the union acts in a representative capacity in the grievance proceeding, it does not act as a mere agent subject to the control of the complaining employee as principal (see *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332), and it is the union rather than the employee that controls the presentation to the arbitrator (*Vaca* v. *Sipes*, *supra*). For this reason, also, it would be inappropriate to apply the principle of collateral estoppel to claims of the employee not directly presented to and decided by the arbitrator. Cf. American Law Institute, *Restatement of Judgments*, § 85, comment *e*.

4. In addition to the foregoing general considerations, the reasons why the courts, in specifically considering Title VII claims, ought not to defer to arbitral decisions may be briefly restated and summarized. First, the arbitral award involves a different issue of law than the one before the court: the arbitrator, typically not a lawyer himself, decides only whether the employer's conduct conforms to the contract, and in so deciding he ordinarily does not draw upon public law concepts; certainly, such concepts are not binding upon the arbitrator in interpreting the collective bargaining agreement.

Second, the arbitral fact-finding process falls far short of judicial standards. Normal rules of evidence do not apply; often there is no opportunity for cross-examination of witnesses and their testimony is not given under oath; discovery is limited. These informal and relatively crude procedures expedite the resolution of labor disputes, but they do not provide a sufficient guarantee of accuracy when important civil rights are at issue.

Third, the employee's claim of discrimination may be inadequately presented to the arbitrator. The union, which controls its presentation, may be unsympathetic to the claim or may, as a matter of litigation strategy, subordinate that claim to others that may appear to be sounder or more appealing to the arbitrator. Or the union's representation of its employees generally may in some cases be inadequate; the union representatives themselves are often not trained in the law.

We believe these considerations demonstrate that the policy adopted by the courts below—one of total deference to the arbitral decision—is unsound and would re-

sult in a substantial and unwarranted diminution of the protective force of Title VII. We further believe that a policy of partial deference, such as that enunciated in *Rios* v. *Reynolds Metals Co.*, 467 F. 2d 54 (C.A. 5) (see also, Edwards & Kaplan, *supra*, 69 Mich. L. Rev. at 651-652), is also unwarranted and should be rejected by this Court. See generally *Meltzer, supra*, 39 U. Chi. L. Rev. at 35-46.

The Fifth Circuit in *Rios* held that, in cases such as this, a district court should examine the prior grievance arbitration on the basis of the following criteria (467 F. 2d at 58):

> First, there may be no deference to the decision unless the arbitral hearing dealt adequately with all factual issues which coincide with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities. The burden of proof in establishing these conditions of limitation will be upon the respondent as distinguished from the claimant.

We agree with the respondent here that under such a procedure, "the district court would find itself holding a hearing to determine if [deference] was appropriate, which hearing could * * * in length and complexity be similar to a Title VII trial" (Resp. Br. 35). At the same time, the *Rios* guidelines are not, in our view, sufficiently protective of the important civil rights established by Title VII. For example, a no-discrimination clause in a collective bargaining agreement may by its terms appear to create a right identical in substance to that conferred by Title VII, yet if the arbitrator does not apply Title VII concepts as elaborated by the courts the rights will not in fact coincide; but *Rios* apparently does not require the district courts to defer only to arbitral decisions expressly and accurately relying upon public law concepts. Similarly, even when all primary factual issues are raised before the arbitrator, there is no reason to believe that he will be as sensitive to subtle forms of discrimination, or to the potentially discriminatory implications of an engrained industrial practice, as are the courts: the arbitrator's findings of fact are unlikely to reflect the kind of vigilant inquiry into employment practices Congress envisioned in enacting Title VII. This is further emphasized by the fact that even "fair and regular" arbitration proceedings are procedurally inadequate under traditional judicial standards and do not provide as full an opportunity, through proof, to reveal subtle forms of discrimination. Moreover, the *Rios* guidelines do not fully take into consid-

eration the possibility of inadequate representation before the arbitrator.

For all of these reasons, we believe that judicial deference to an arbitrator's findings in a grievance proceeding is wholly inappropriate in a Title VII case.

2. But even assuming *arguendo* that some policy of partial deference is appropriate, there is no basis for deference to the arbitral decision in this case. Even though the district court found that the claim of discrimination was presented to the arbitrator (App. 34), the arbitrator did not discuss or purport to decide the issue of discimination. His finding was simply that "the discharge * * * was for just cause" (App. 21). That finding is not inconsistent with petitioner's claim of discrimination: even if petitioner was not qualified for the position he held, and therefore properly subject to dismissal, he was discriminated against if white employees similarly unqualified are treated differently (*e.g.*, demoted but not discharged).* But the union presented no probative evidence on this issue (see App. 22). In fact, the union in representing petitioner did not even raise the claim of racial discrimination; that issue was put before the arbitrator—to

* In the field of labor relations it is well established that a finding of just cause for discharge does not preclude a finding that the discharge was discriminatory. See, *e.g.*, *Edward G. Budd Mfg. Co.* v. *National Labor Relations Board*, 138 F. 2d 86 (C.A. 3), certiorari denied, 321 U.S. 778.

the limited extent that it can be said to have been raised at all—only by petitioner, and his principal reference to the issue was to state that because the union's representation of his claim was inadequate, he had lodged a complaint against respondent with the state equal employment agency (App. 14).

Thus the arbitral proceeding here failed to satisfy even the *Rios* guidelines. It is not clear that the no-discrimination clause of the contract coincides with Title VII rights, as interpreted and applied by the courts. Nor is it plain that the arbitrator's decision, by sustaining a discharge in circumstances where white employees may only be demoted, does not contravene Title VII policy. Moreover, the evidence presented did not deal adequately with all factual issues raised by the claim of discrimination, and the arbitrator did not expressly decide those factual issues. To permit such cursory arbitral consideration of claimed discrimination to foreclose an employee's efforts to obtain judicial vindication of his Title VII rights would seriously weaken enforcement of Title VII and thus jeopardize achievement of the important economic and social objectives of that Act.

CONCLUSION

For the reasons stated above, the judgment below should be reversed and the case remanded for trial of petitioner's Title VII claims.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
J. STANLEY POTTINGER,
Assistant Attorney General.
LAWRENCE G. WALLACE,
Deputy Solicitor General.
KEITH A. JONES,
Assistant to the Solicitor General.
DENIS F. GORDON,
EILEEN M. STEIN,
Attorneys.

WILLIAM A. CAREY,
General Counsel,
JOSEPH T. EDDINS,
Assistant General Counsel,
BEATRICE ROSENBERG,
CHARLES L. REISCHEL,
Attorneys,
Equal Employment Opportunity Commission.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ALEXANDER *v.* GARDNER-DENVER CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 72-5847. Argued November 5, 1973—
Decided February 19, 1974

Following discharge by his employer, respondent company, petitioner, a black, filed a grievance under the collective-bargaining agreement between respondent and petitioner's union, which contained a broad arbitration clause, petitioner ultimately claiming that his discharge resulted from racial discrimination. Upon rejection by the company of petitioner's claims, an arbitration hearing was held, prior to which petitioner filed with the Colorado Civil Rights Commission a racial discrimination complaint which was referred to the Equal Employment Opportunity Commission (EEOC). The arbitrator ruled that petitioner's discharge was for cause. Following the EEOC's subsequent determination that there was not reasonable ground to believe that a violation of Title VII of the Civil Rights Act of 1964 had occurred, petitioner brought this action in District Court, alleging that his discharge resulted from a racially discriminatory employment practice in violation of the Act. The District Court granted respondent's motion for summary judgment, holding that petitioner was bound by the prior arbitral decision and had no right to sue under Title VII. The Court of Appeals affirmed. *Held:* An employee's statutory right to trial *de novo* under Title VII of the Civil Rights Act of 1964 is not foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement. Pp. 7-23.

(a) Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination, as may be inferred from the legislative history of Title VII, which manifests a congressional intent to allow an individual to

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pursue rights under Title VII and other applicable state and federal statutes. Pp. 10–12.

(b) The doctrine of election of remedies is inapplicable in the present context, which involves statutory rights distinctly separate from the employee's contractual rights, regardless of the fact that violation of both rights may have resulted from the same factual occurrence. Pp. 12–14.

(c) By merely resorting to the arbitral forum petitioner did not waive his cause of action under Title VII; the rights conferred thereby cannot be prospectively waived and form no part of the collective-bargaining process. Pp. 14–15.

(d) The arbitrator's authority is confined to resolution of questions of contractual rights, regardless of whether they resemble or duplicate Title VII rights. Pp. 15–17.

(e) In instituting a Title VII action, the employee is not seeking review of the arbitrator's decision and thus getting (as the District Court put it) "two strings to his bow when the employer has only one," but is asserting a right independent of the arbitration process that the statute gives to employees, the only possible victims of discriminatory employment practices. P. 17.

(f) Permitting an employee to resort to the judicial forum after arbitration procedures have been followed does not undermine the employer's incentive to arbitrate, as most employers will regard the benefits from a no-strike pledge in the arbitration agreement as outweighing any costs resulting from giving employees an arbitral antidiscrimination remedy in addition to their Title VII judicial remedy. Pp. 17–18.

(g) A policy of deferral by federal courts to arbitral decisions (as opposed to adoption of a preclusion rule) would not comport with the congressional objective that federal courts should exercise the final responsibility for enforcement of Title VII and would lead to: the arbitrator's emphasis on the law of the shop rather than the law of the land; factfinding and other procedures less complete than those followed in a judicial forum; and perhaps employees bypassing arbitration in favor of litigation. Pp. 18–23.

(h) In considering an employee's claim, the federal court may admit the arbitral decision as evidence and accord it such weight as may be appropriate under the facts and circumstances of each case. Pp. 22–23.

466 F. 2d 1209, reversed.

POWELL, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 72-5847

Harrell Alexander, Sr., Petitioner, v. Gardner-Denver Company. | On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[February 19, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case concerns the proper relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements in the resolution and enforcement of an individual's rights to equal employment opportunities under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* Specifically, we must decide under what circumstances, if any, an employee's statutory right to a trial *de novo* under Title VII may be foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.

I

In May 1966, petitioner Harrell Alexander, Sr., a black, was hired by respondent Gardner-Denver Company (the "company") to perform maintenance work at the company's plant in Denver, Colorado. In June 1968, petitioner was awarded a trainee position as a drill operator. He remained at that job until his discharge from employment on September 29, 1969. The company informed petitioner that he was being discharged for producing too

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I

In May 1966, petitioner Harrell Alexander, Sr., a black, was hired by respondent Gardner-Denver Company (the "company") to perform maintenance work at the company's plant in Denver, Colorado. In June 1968, petitioner was awarded a trainee position as a drill operator. He remained at that job until his discharge from employment on September 29, 1969. The company informed petitioner that he was being discharged for producing too

many defective or unusable parts that had to be scrapped.

On October 1, 1969, petitioner filed a grievance under the collective-bargaining agreement in force between the company and petitioner's union, Local No. 3029 of the United Steelworkers of America (the "union"). The grievance stated: "I feel I have been unjustly discharged and ask that I be reinstated with full seniority and pay." No explicit claim of racial discrimination was made.

Under Art. 4 of the collective-bargaining agreement, the company retained "the right to hire, suspend or discharge [employees] for proper cause."[1] Art. 5, § 2 provided, however, that "there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry,"[2] and Art. 23, § 6 (a)

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[1] Article 4 of the agreement provided:

"MANAGEMENT

"The Union recognizes that all rights to manage the Plant, to determine the products to be manufactured, the methods of manufacturing or assembling, the scheduling or production, the control of raw materials, and to direct the working forces, including the right to hire, suspend or discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reasons, and the right to maintain order and efficiency are vested exclusively in the Company.

"It is understood by the parties that all rights recognized in this Article are subject to the terms of this Agreement."

[2] Article 5 of the agreement provided:

"MUTUAL RESPONSIBILITY

"Section 1. The parties agree that during the term of this Agreement there shall be no strike, slow-down or other interruption of production, and that for the same period there shall be no lockout, subject to the provisions of Article 26, Term of Agreement.

"Section 2. The Company and the Union agree that there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry. The Company

stated that "[n]o employee will be discharged, suspended or given a written warning notice except for just cause." The agreement also contained a broad arbitration clause covering "differences aris[ing] between the Company and the Union as to the meaning and application of the provisions of this Agreement" and "any trouble aris[ing] in the plant."[3] Disputes were to be submitted to a multi-

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further states and the Union approves that no such discrimination shall be practiced against any applicant for employment."

[3] Article 23, containing the grievance-arbitration procedures of the agreement, provided in relevant part:

. . . . .

"*Section 5.* Should differences arise between the Company and the Union as to the meaning and application of the provisions of this Agreement, or should any trouble arise in the plant, there shall be no suspension of work, but an earnest effort shall be made by both the Company and the Union to settle such differences promptly. Grievances must be presented within five (5) working days after the date of the occurrence giving rise to the grievance or they shall be considered waived. Grievances shall be taken up in the following manner; except that any grievance filed by the Local Union shall be submitted in writing at Step 3 of the grievance procedure as set forth herein:

"*Step 1.* An attempt shall first be made by the employee with or without his assistant grievance committeeman (at the employee's option), and the employee's foreman to settle the grievance. The foreman shall submit his answer within one (1) working day and if the grievance is not settled, it shall be reduced to writing, signed by the employee and his assistant grievance committeeman, and the foreman shall submit his signed answer of such grievance.

"*Step 2.* If the grievance is not settled in Step 1, it shall be presented to the Superintendent, or his representative, within two (2) working days after the Union has received the Foreman's answer in Step 1. The Superintendent or his representative shall submit his signed answer two (2) working days after receiving the grievance.

"*Step 3.* If the grievance is not settled in Step 2, it shall be presented to the manager of Manufacturing or his representative within five (5) working days after the Union has received the Superintendent's answer in Step 2. The Manager of Manufacturing

step grievance procedure, the first four steps of which involved negotiations between the company and the union. If the dispute remained unresolved, it was to be

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or his representative shall meet with the representatives of the Union to attempt to resolve the grievance within five (5) working days following the presentation of the grievance. The Manager of Manufacturing or his representative shall submit his signed answer within three (3) working days after the date of such meeting.

"*Step 4.* If the grievance is not settled in Step 3, it shall be referred to the Personnel Manager, and/or his representatives, and the International representative and chairman of the grievance committee within five (5) working days after the Union has received the Step 3 answer. Within ten (10) working days after the grievance has been referred to Step 4, the above mentioned parties shall meet for the purpose of discussing such grievance. Within five (5) working days following the meeting, the Company representatives shall submit their signed answer to the Union. The Union representatives shall signify their concurrence or non-concurrence and affix their signatures to the grievance.

"*Step 5.* Grievances which have not been settled under the foregoing procedure may be referred to arbitration by notice in writing within ten (10) calendar days after the date of the Company's final answer in Step 4. Within five (5) days after receipt of referral to arbitration the parties shall select an impartial arbitrator.

"Should the parties be unable to agree upon an arbitrator, the selection shall be made by the Senior Judge of the U. S. Circuit Court of Appeals for the Tenth Circuit. The decision of the arbitrator shall be final and binding upon the Company, the Union, and any employee or employees involved. The expenses and fee of the arbitrator shall be divided equally between the Company and the Union. The arbitrator shall not amend, take away, add to, or change any of the provisions of this Agreement, and the arbitrator's decision must be based solely upon an interpretation of the provisions of this Agreement.

"*Section 6.* (a) No employee will be discharged, suspended or given a written warning notice except for just cause.

. . . . .

"(g) Should it be determined that the employee has been unjustly suspended or discharged the Company shall reinstate the employee and pay full compensation at the employee's basic hourly rate or earned rate, whichever is the higher, for the time lost."

remitted to compulsory arbitration. The company and the union were to select and pay the arbitrator, and his decision was to be "final and binding upon the Company, the Union, and any employee or employees involved." The agreement further provided that "[t]he arbitrator shall not amend, take away, add to, or change any of the provisions of this Agreement, and the arbitrator's decision must be based solely on an interpretation of the provisions of this Agreement." The parties also agreed that there "shall be no suspension of work" over disputes covered by the grievance-arbitration clause.

The union processed petitioner's grievance through the above machinery. In the final prearbitration step, petitioner raised, apparently for the first time, the claim that his discharge resulted from racial discrimination. The company rejected all of petitioner's claims, and the grievance proceeded to arbitration. Prior to the arbitration hearing, however, petitioner filed a charge of racial discrimination with the Colorado Civil Rights Commission, which referred the complaint to the Equal Employment Opportunity Commission on November 5, 1969.

At the arbitration hearing on November 20, 1969, petitioner testified that his discharge was the result of racial discrimination and informed the arbitrator that he had filed a charge with the Colorado Commission because he "could not rely on the union." The union introduced a letter in which petitioner stated that he was "knowledgeable that in the same plant others have scrapped an equal amount and sometimes in excess, but by all logical reasoning I . . . have been the target of preferential discriminatory treatment." The union representative also testified that the company's usual practice was to transfer unsatisfactory trainee drill operators back to their former positions.

On December 30, 1969, the arbitrator ruled that petitioner had been "discharged for just cause." He made

no reference to petitioner's claim of racial discrimination. The arbitrator stated that the union had failed to produce evidence of a practice of transferring rather than discharging trainee drill operators who accumulated excessive scrap, but he suggested that the company and the union confer on whether such an arrangement was feasible in the present case.

On July 25, 1970, the Equal Employment Opportunity Commission determined that there was not reasonable cause to believe that a violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, had occurred. The Commission later notified petitioner of his right to institute a civil action in federal court within 30 days. Petitioner then filed the present action in the United States District Court for the District of Colorado, alleging that his discharge resulted from a racially discriminatory employment practice in violation of § 703 (a) (1) of the Act. See 42 U. S. C. § 2000e–2 (a)(1).

The District Court granted respondent's motion for summary judgment and dismissed the action. 346 F. Supp. 1012 (1971). The court found that the claim of racial discrimination had been submitted to the arbitrator and resolved adversely to petitioner.[4] It then held that petitioner, having voluntarily elected to pursue his grievance to final arbitration under the nondiscrimination clause of the collective-bargaining agreement, was bound by the arbitral decision and thereby precluded from suing his employer under Title VII. The Court of Appeals for the Tenth Circuit affirmed *per curiam* on the basis of the District Court's opinion. 466 F. 2d 1209 (1972).

We granted petitioner's application for certiorari. 410 U. S. 925 (1973). We reverse.

[4] In reaching this conclusion, the District Court relied on petitioner's deposition acknowledging that he had raised the racial discrimination claim during the arbitration hearing. 346 F. Supp. 1012, 1014.

II

Congress enacted Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973); *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429–430 (1971). Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing State and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit. In the Equal Employment Opportunity Act of 1972, Pub. L. 92–261, 86 Stat. 103, Congress amended Title VII to provide the Commission with further authority to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge.

Even in its amended form, however, Title VII does not provide the Commission with direct powers of enforcement. The Commission cannot adjudicate claims or impose administrative sanctions. Rather, final responsibility for enforcement of Title VII is vested with federal courts. The Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices. 42 U. S. C. § 2000e–5 (f) and (g). Courts retain these broad remedial powers despite a Commission finding of no reasonable cause to believe

that the Act has been violated. *McDonnell Douglas Corp.* v. *Green, supra,* 411 U. S., at 798–799. Taken together, these provisions make plain that federal courts have been assigned plenary powers to secure compliance with Title VII.

In addition to reposing ultimate authority in federal courts, Congress gave private individuals a significant role in the enforcement process of Title VII. Individual grievants usually initiate the Commission's investigatory and conciliatory procedures. And although the 1972 amendment to Title VII empowers the Commission to bring its own actions, the private right of action remains an essential means of obtaining judicial enforcement of Title VII. 42 U. S. C. § 2000e–5 (f)(1). In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices. *Hutchings* v. *United States Industries, Inc.,* 428 F. 2d 303, 310 (CA5 1970); *Bowe* v. *Colgate-Palmolive Co.,* 416 F. 2d 711, 715 (CA7 1969); *Jenkins* v. *United Gas Corporation,* 400 F. 2d 28, 33 (CA5 1968). See also *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U. S. 400, 402 (1968).

Pursuant to this statutory scheme, petitioner initiated the present action for judicial consideration of his rights under Title VII. The District Court and the Court of Appeals held, however, that petitioner was bound by the prior arbitral decision and had no right to sue under Title VII.[8] Both courts evidently thought that this result was

[8] The District Court recognized that a conflict of authorities existed on this issue but chose to rely on *Dewey* v. *Reynolds Metals Co.,* 429 F. 2d 324, 332 (CA6 1970), affirmed by an equally divided Court, 402 U. S. 689 (1971). There, the Sixth Circuit held that prior submission of an employee's claim to arbitration under a collective-bargaining agreement precluded a later suit under Title VII. The Sixth Circuit appears to have since retreated in part from *Dewey*

dictated by notions of election of remedies and waiver and by the federal policy favoring arbitration of labor disputes, as enunciated by this Court in *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957), and the *Steelworkers Trilogy*.[6] See also *Boys Markets, Inc.* v.

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by suggesting that there is no preclusion where both arbitration and "court or agency processes" are pursued simultaneously. See *Spann* v. *Kaywood Division, Joanna Western Mills Co.*, 446 F. 2d 120, 122 (1971). The Fifth, Seventh, and Ninth Circuits have squarely rejected a preclusion rule. See *Hutchings* v. *United States Industries, Inc.*, 428 F. 2d 303 (CA5 1970); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (CA7 1969); *Oubichon* v. *North American Rockwell Corp.*, 482 F. 2d 569 (CA9 1973).

[6] *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). In *Textile Workers Union* v. *Lincoln Mills*, *supra*, this Court held that a grievance-arbitration provision of a collective-bargaining agreement could be enforced against unions and employers under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185. The Court noted that the congressional policy, as embodied in § 203 (d) of the LMRA, 29 U. S. C. § 173 (d), was to promote industrial peace and that the grievance-arbitration provision of a collective agreement was a major factor in achieving this goal. *Id.*, at 455. In the *Steelworkers Trilogy*, the Court further advanced this policy by declaring that an order to arbitrate will not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of America* v. *Warrior Gulf Navigation Co.*, 363 U. S. 564, 582–583 (1960). The Court also stated that "so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 599 (1960). And in *Republic Steel Co.* v. *Maddox*, 379, U. S. 650 (1965), the Court held that grievance-arbitration procedures of a collective bargaining agreement must be

Retail Clerks Union, 398 U. S. 235 (1970); *Gateway Coal Co.* v. *United Mine Workers of America, et al.*, — U. S. — (1974). We disagree.

III

Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements. It does, however, vest federal courts with plenary powers to enforce the statutory requirements; and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue. 42 U. S. C. §§ 2000e–5 (b), (e), and (f). See *McDonnell Douglas Corp.* v. *Green*, *supra*, 411 U. S., at 798. There is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction.

In addition, legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination.[7] In the Civil Rights Act of 1964, 42 U. S. C. § 2000a *et seq.*, Congress indicated that it considered the policy against discrimination to be of the "highest priority." *Newman* v. *Piggie Park Enterprises, Inc.*, *supra*, 390 U. S., at 402.

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exhausted before an employee may file suit to enforce contractual rights.

For the reasons stated in Parts III, IV, and V of this opinion, we hold that the federal policy favoring arbitration does not establish that an arbitrator's resolution of a contractual claim is dispositive of a statutory claim under Title VII.

[7] See, *e. g.*, 42 U. S. C. § 1981 (Civil Rights Act of 1866); 42 U. S. C. § 1983 (Civil Rights Act of 1871).

Consistent with this view, Title VII provides for consideration of employment-discrimination claims in several forums. See 42 U. S. C. § 2000e–5 (b) (EEOC); 42 U. S. C. § 2000e–5 (c) (State and local agencies); 42 U. S. C. § 2000e–5 (f) (federal courts). And, in general, submission of a claim to one forum does not preclude a later submission to another.[8] See 42 U. S. C. §§ 2000e–5 (b) and (f); *McDonnell Douglas Corp.* v. *Green, supra.* Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.[9] The clear in-

[8] For example, Commission action is not barred by "findings and orders" of state or local agencies. See 42 U. S. C. § 2000e–5 (b). Similarly, an individual's cause of action is not barred by a Commission finding of no reasonable cause to believe that the Act has been violated. See 42 U. S. C. § 2000e–5(f); *McDonnell Douglas Corp.* v. *Green, supra.*

[9] For example, Senator Joseph Clark, one of the sponsors of the bill, introduced an interpretive memorandum which stated: "Nothing in Title VII or anywhere else in this bill affects the rights and obligations under the NLRA or the Railway Labor Act . . . . Title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other federal and state statutes. If a given action should violate both Title VII and the National Labor Relations Act, the National Relations Board would not be deprived of jurisdiction." 110 Cong Rec. 7207 (1964). Moreover, the Senate defeated an amendment which would have made Title VII the exclusive federal remedy for most unlawful employment practices. 110 Cong. Rec. 13650–13652 (1964). And a similar amendment was rejected in connection with the Equal Employment Opportunity Act of 1972. See H. R. 9247, 92d Cong., 1st Sess. (1971). See also 2 U. S. Code Cong. & Admin. News, 92d Cong., 2d Sess. (1972), pp. 2137, 2179, 2181–2182. The report of the Senate Committeee responsible for the 1972 Act explained that the "provisions regarding the individual's right to sue under Title VII, nor any of the provisions of this bill, are meant to affect existing rights granted under other laws." S. Rep. No. 415, at 24, 92d Cong., 1st Sess. (1971). For a detailed discussion of the legislative

ference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.

In reaching the opposite conclusion, the District Court relied in part on the doctrine of election of remedies.[10] That doctrine, which refers to situations where an individual pursues remedies that are legally or factually inconsistent,[11] has no application in the present context.

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history of the 1972 Act, see Sape and Hart, Title VII Reconsidered: The Equal Opportunity Act of 1972, 40 Geo. Wash. L. Rev. 824 (1972).

[10] The District Court adopted the reasoning of the Sixth Circuit in *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 324, 332 (1970), affirmed by an equally divided Court, 402 U. S. 689 (1971), which was apparently based in part on the doctrine of election of remedies. See n. 5, *supra*. The Sixth Circuit, however, later described *Dewey* as resting instead on the doctrine of equitable estoppel and on "themes of *res judicata* and collateral estoppel." *Newman* v. *Avco Corp.*, 451 F. 2d 743, 746 n. 1 (CA6 1971). Whatever doctrinal label is used, the essence of these holdings remains the same. The policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel.

[11] See generally 5A Corbin, Contracts, §§ 1214–1227 (1971 ed.) Most courts have recognized that the doctrine of election of remedies does not apply to suits under Title VII. See, *e. g.*, *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 714–715 (CA7 1969); *Hutchings* v. *United States Industries, Inc.*, 428 F. 2d 303, 314 (CA5 1970); *Macklin* v. *Spencer Freight Systems, Inc.*, 478 F. 2d 979, 990–991 (CADC 1973); *Voutsis* v. *Union Carbide Corp.*, 452 F. 2d 889, 893–894 (CA2 1971), cert. denied, 406 U. S. 930 (1971); *Newman* v. *Avco Corp.*, 451 F. 2d 743, 746 n. 1 (CA6 1971); *Oubichon* v. *North American Rockwell Corp.*, 482 U. S. 569, 572–573 (CA9 1973).

In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums. The resulting scheme is somewhat analogous to the procedure under the National Labor Relations Act, as amended,[12] where disputed transactions may implicate both contractual and statutory rights. Where the statutory right underlying a particular claim may not be abridged by contractual agreement, the Court has recognized that consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude subsequent consideration of the claim by the National Labor Relations Board as an unfair labor practice charge or as a petition for clarification of the union's representation certificate under the Act. *Carey* v. *Westinghouse Corp.*, 375 U. S. 261 (1964).[13] Cf. *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962). There, as here, the relationship between

[12] 61 Stat. 136, 29 U. S. C. § 151 *et seq.*

[13] As the Court noted in *Carey:*

"By allowing the dispute to go to arbitration . . . those conciliatory measures which Congress deemed vital to 'industrial peace' . . . and which may be dispositive of the entire dispute, are encouraged. The superior authority of the Board may be invoked at any time. Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area." 375 U. S., at 272.

Should disagreements arise between the Board and the arbitrator, the Board's ruling would, of course, take precedence as to those issues within its jurisdiction. *Ibid.*

the forums is complementary since consideration of the claim by both forums may promote the policies underlying each. Thus, the rationale behind the election of remedies doctrine cannot support the decision below.[14]

We are also unable to accept the proposition that petitioner waived his cause of action under Title VII. To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270 (1956); *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U. S. 235 (1970). These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for unit members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional

[14] Nor can it be maintained that election of remedies is required by the possibility of unjust enrichment through duplicative recoveries. Where, as here, the employer has prevailed at arbitration, there of course can be no duplicative recovery. But even in cases where the employee has first prevailed, judicial relief can be structured to avoid such windfall gains. See, *e. g.*, *Oubichon* v. *North American Rockwell Corp.*, 482 F. 2d 569 (CA9 1973); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (CA7 1971). Furthermore, if the relief obtained by the employee at arbitration were fully equivalent to that obtainable under Title VII, there would be no further relief for the court to grant and hence no need for the employee to institute suit.

purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible to prospective waiver. See *Wilko* v. *Swan*, 346 U. S. 427 (1953).

The actual submission of petitioner's grievance to arbitration in the present case does not alter the situation. Although presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement,[15] mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver. Since an employee's rights under Title VII may not be waived prospectively, existing contractual rights and remedies against discrimination must result from other concessions already made by the union as part of the economic bargain struck with the employer. It is settled law that no additional concession may be exacted from any employee as the price for enforcing those rights. *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, 338–339 (1944).

Moreover, a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to the aggrieved employee. This point becomes apparent through consideration of the role of the arbitrator in the system of industrial self-government.[16]

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[15] In this case petitioner and respondent did not enter into a voluntary settlement expressly conditioned on a waiver of petitioner's cause of action under Title VII. In determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing. In no event can the submission to arbitration of a claim under the nondiscrimination clause of a collective-bargaining agreement constitute a binding waiver with respect to an employee's rights under Title VII.

[16] See Meltser, Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination, 39 U. Chi. L. Rev. 30,

As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties:

> "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S., at 597.

If an arbitral decision is based "solely on the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of his submission," and the award will not be enforced. *Ibid.*

32–35 (1971); Meltzer, Ruminations About Ideology, Law, and Arbitration, 34 U. Chi. L. Rev. 545 (1967). As the late Dean Shulman stated:

"A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of industrial self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement." Shulman, Reason, Contracts and Law in Labor Relations, 68 Harv. L. Rev. 999, 1016 (1955).

Thus the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.

IV

The District Court and the Court of Appeals reasoned that to permit an employee to have his claim considered in both the arbitral and judicial forums would be unfair since this would mean that the employer, but not the employee, was bound by the arbitral award. In the District Court's words, it could not "accept a philosophy which gives the employee two strings to his bow when the employer has only one." 346 F. Supp., at 1019. This argument mistakes the effect of Title VII. Under the *Steelworker's Trilogy*, an arbitral decision is final and binding on the employer and employee, and judicial review is limited as to both. But in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process. An employer does not have "two strings to his bow" with respect to an arbitral decision for the simple reason that Title VII does not provide employers with a cause of action against employees. An employer cannot be the victim of discriminatory employment practices. *Oubichon v. North American Rockwell Corp.*, 482 F. 2d 569, 573 (CA9 1973).

The District Court and the Court of Appeals also thought that to permit a later resort to the judicial forum would undermine substantially the employer's incentive to arbitrate and would "sound the death knell for arbitration clauses in labor contracts." 346 F. Supp., at 1019. Again, we disagree. The primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike. As the

Court stated in *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U. S. 235, 248 (1970), "a no strike obligation, express or implied, is the *quid pro quo* for an undertaking by an employer to submit grievance disputes to the process of arbitration." It is not unreasonable to assume that most employers will regard the benefits derived from a no-strike pledge as outweighing whatever costs may result from according employees an arbitral remedy against discrimination in addition to their judicial remedy under Title VII. Indeed, the severe consequences of a strike may make an arbitration clause almost essential from both the employees' and the employer's perspective. Moreover, the grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices. Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee. An employer thus has an incentive to make available the conciliatory and theraputic processes of arbitration which may satisfy an employee's perceived need to resort to the judicial forum, thus saving the employer the expense and aggravation associated with a lawsuit. For similar reasons, the employee also has a strong incentive to arbitrate grievances, and arbitration may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum.

V

Respondent contends that even if a preclusion rule is not adopted, federal courts should defer to arbitral decisions on discrimination claims where: (i) the claim

was before the arbitrator; (ii) the collective-bargaining agreement prohibited the form of discrimination charged in the suit under Title VII; and (iii) the arbitrator has authority to rule on the claim and to fashion a remedy.[17] Under respondent's proposed rule, a court would grant summary judgment and dismiss the employee's action if the above conditions were met. The rule's obvious consequence in the present case would be to deprive the petitioner of his statutory right to attempt to establish his claim in a federal court.

At the outset, it is apparent that a deferral rule would be subject to many of the objections applicable to a preclusion rule. The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal. Furthermore, we have long recognized that "the choice of forums inevitably affects the scope of the substantive right to be vindicated." *U. S. Bulk Carriers* v. *Arguelles*, 400 U. S. 358, 359–360 (1971) (Harlan, J., concurring). Respondent's deferral rule is necessarily premised on the assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues. We deem this supposition unlikely.

Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the

[17] Brief of Respondent, at 37. Respondent's proposed rule is analogous to the NLRB's policy of deferring to arbitral decisions on statutory issues in certain cases. See *Spielberg Manufacturing Co.*, 112 N. L. R. B. 1080, 1082 (1955).

requirements of enacted legislation. Where the collective-bargaining agreement conflicts with Title VII, the arbitration must follow the agreement. To be sure, the tension between contractual and statutory objectives may be mitigated where a collective-bargaining agreement contains provisions facially similar to those of Title VII. But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, at 581–583.[18] Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proven especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

Moreover, the fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under

[18] See also Gould, Labor Arbitration of Grievances Involving Racial Discrimination, 118 U. Pa. L. Rev. 40, 47–48 (1969); Platt, The Relationship between Arbitration and Title VII of the Civil Rights Act of 1964, 3 Ga. L. Rev. 398 (1969). Significantly, a substantial proportion of labor arbitrators are not lawyers. See Note, The NLRB and Deference to Arbitration, 77 Yale L. J. 1191, 1194, n. 28 (1968). This is not to suggest, of course, that arbitrators do not possess a high degree of competence with respect to the vital role in implementing the federal policy favoring arbitration of labor disputes.

oath, are often severely limited or unavailable. See *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 203 (1956); *Wilko* v. *Swan*, 346 U. S. 427, 435–437 (1953). And as this Court has recognized, "[a]rbitrators have no obligation to the court to give their reasons for an award." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, at 598. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.[19]

It is evident that respondents' proposed rule would not allay these concerns. Nor are we convinced that the solution lies in applying a more demanding deferral standard, such as that adopted by the Fifth Circuit in *Rios* v. *Reynolds Metals Co.*, 467 F. 2d 54 (1972).[20] As

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[19] A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented. See *Vaca* v. *Sipes*, 386 U. S. 171 (1967); *Republic Steel Co.* v. *Maddox*, 379 U. S. 650 (1965). In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. See *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332 (1944). Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made. See, *e. g.*, *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U. S. 210 (1944). And a breach of the union's duty of fair representation may prove difficult to establish. See *Vaca* v. *Sipes*, *supra*; *Humphrey* v. *Moore*, 375 U. S. 335, 342, 348–351. In this respect, it is noteworthy that Congress thought it necessary to afford the protections of Title VII against unions as well as employers. See 52 U. S. C. § 2000e–2 (c).

[20] In *Rios*, the court set forth the following deferral standard: "First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way

respondent points out, a standard that adequately insured effectuation of Title VII rights in the arbitral forum would tend to make arbitration a procedurally complex, expensive, and time-consuming process. And judicial enforcement of such a standard would almost require courts to make *de novo* determinations of the employees' claims. It is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights.

A deferral rule also might adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less.

We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause

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violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities. The burden of proof in establishing these conditions of limitation will be upon the respondent as distinguished from the claimant." 467 F. 2d, at 58. For a discussion of the problems posed by application of the *Rios* standard, see Note, Judicial Deference to Arbitrators' Decisions in Title VII Cases, 26 Stan. L. Rev. 421 (1974).

of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.[21]

The judgment of the Court of Appeals is

Reversed.

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[21] We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.